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REFERENCE BOOK

HINTS

*Whelan* <sup>TO</sup> *Holman*

COURTS MARTIAL,

CONFIRMING AND COMMANDING OFFICERS  
UPON MANY MATTERS USUALLY COMING UNDER

THEIR NOTICE.

OLD COLLECTION

Not to be taken out

BY

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## INTRODUCTION.

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FOR several years before the passing of the Army Act, 1881, Military Law was in a transition state. Changes were either imminent or in process of embodiment. That fact prevented any previous attempt on my part to fulfil the main object of this work, viz. the publication in a brief, popular, and easily intelligible shape of something in the nature of a digest of authoritative opinions upon the various questions that commonly come to be dealt with by Courts Martial. These opinions have the character and weight of judicial decisions. But, unlike the judgments of the ordinary tribunals, which interpret, and in a certain sense make the law, they are communicated to nobody but the persons connected with the particular case dealt with at the moment. Whatever value they may possess in the way of guidance and precedent is thus to a great extent lost. In the following pages I have

summarized and applied generally many of these rulings, accompanied with remarks applicable to the administration of Military Law. The work is not intended to be an exact or exhaustive treatise. If it were, it would possibly be too voluminous and technical to secure the attention I venture to anticipate for it in its present handy shape. I hope that, when read together with the penal sections of the Army Act, 1881, and the new Rules of Procedure, it will be found to meet in a practical way probably nineteen out of twenty of the points arising in ordinary course before a Court Martial.

With the exception of the chapter on Evidence, and some remarks of a general character, the "hints" are arranged under the sections of the Army Act, 1881, to which they respectively refer. I have thought this the most convenient arrangement for purposes of reference.

It is perhaps right for me to add that the work is altogether unofficial.

J. C. O'DOWD.

*April, 1882.*

## INTRODUCTION

### TO THE SECOND EDITION.

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IN putting forward a Second Edition I have to express my grateful acknowledgments to many officers for their kindly remarks and valuable suggestions. An adoption of some of the latter would, however, involve an increase in the size of the book. I have contented myself with a general revision, and some slight additions where they seemed desirable. Two new rulings have to be noted, as to non-liability (1) for involuntary absence, and (2) for loss of kit occurring more than three years before the time of trial.

*September, 1883.*



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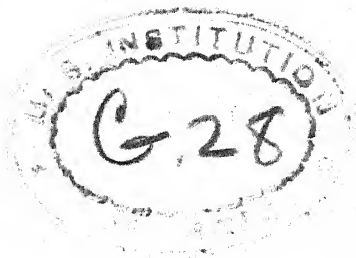


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## HINTS TO COURTS MARTIAL.

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### EVIDENCE.

A CHARGE to which a prisoner does not plead guilty must be proved in all its essential parts by evidence ; that is to say, by

- (a) the statement on oath or affirmation of a competent witness speaking directly and from personal knowledge ; or
- (b) documents legally admissible in evidence ; or
- (c) the admission or confession of the accused when not made under such threat, or promise, or inducement of any specific advantage, as to divest it of a voluntary character ; or
- (d) matters which from notoriety or universal acceptance may be presumed in the absence of evidence to the contrary ; or

(e) in trials for homicide, the declaration of the person killed, made under the conviction that death is imminent.

1. Of the actual commission of the offence charged; or

2. Of facts establishing, beyond reasonable doubt, the inference that the prisoner committed the offence charged;

All persons are competent witnesses before a Court Martial, except

1. The prisoner, or any prisoner being tried jointly with him;

2. The wife of the prisoner, or of any prisoner being tried jointly with him (unless where the charge is for an offence against herself);

3. Any person who, in the opinion of the Court, from extreme youth, ignorance, or defective mental condition is unacquainted with the nature and obligations of an oath, or does not possess the faculties of memory and reason;

4. A member of the Court Martial (who may, however, be a witness for the defence).

Speaking directly, and from personal knowledge,



means a statement of a fact or condition of things which is manifest to the senses of the witness.

Evidence must be relevant to the issue; that is, to the question, whether the prisoner is guilty or not guilty.

Relevant evidence includes statements of any fact, or condition of things,

directly or indirectly connected with,  
qualifying,

supplying a motive for,

showing a preparation for,

affording an explanation of,

showing a cause or effect of,

disclosing the impossibility or improbability of,

affecting the credibility of a witness to,

the facts forming the essential allegations of the charge.

Facts not in themselves relevant, but necessary to be known in order to explain or introduce relevant facts, are admissible. Thus, the subsequent conduct of the accused being relevant, statements made in his hearing, in so far as they tend to explain or influence that conduct, are also relevant. But these statements are not evidence of the truth of the facts they represent or suggest. Thus when



a person states in the hearing of an accused, that the body of a murdered man has been found concealed, and the accused becomes violently agitated, or drops some expression tending to show his knowledge of the crime, it is evidence, so far as the conduct arising therefrom may be taken as a sign of guilt. But it is not evidence that a murder was committed, or that a body was actually found as stated.

The best (*i.e.* the most direct) evidence of any fact must be given, and indirect or secondary evidence can be received only upon proof that the best evidence cannot be obtained. Thus it is only when the attendance of a person as a witness is physically impossible, that his previous deposition on oath can be received, and then only upon proof that the deposition was made in the presence of the accused, and with full opportunity of cross-examination. So a legal document is the best evidence of its contents, and oral evidence regarding its contents can be given only upon proof that it has been destroyed or lost, and that all reasonable efforts have been made to find it and have failed.

The official documents which are made legal evidence by the Army Act (Sections 72 and 163)

are sufficient to warrant an assumption of the existence of the facts stated therein, if they are not refuted by other evidence. But it is open to a prisoner to show that they are incorrect. Thus, when an attestation paper is produced to prove that a certain answer was given, the prisoner may bring forward oral evidence that he did not actually answer as recorded, or that the question was not put to him.

The production of the original proceedings of a Court Martial, or of a copy certified, as provided in Section 165, is evidence of the fact that the Court was held, and that the prisoner was charged, tried, and convicted as stated. But these proceedings are not evidence of the truth of the facts recorded therein as having been deposed to by the witnesses.

But upon legal proof that a witness swore to a certain fact before a Court Martial, the existence of that fact may be assumed against him upon his subsequent trial.

The documents thus made evidence by the Army Act must be produced by a witness, stating upon oath that, to the best of his belief, they are what they purport to be. It is not sufficient merely to hand them in. This observation however does not

apply to the public documents, specified in subsections *c*, *d*, and *e* of Section 163.

An original private telegram is evidence, and the Post Office authorities are bound to produce it upon due notice.

A State document, the production of which is declared to be against public policy by the Minister having it in his custody, is privileged, and cannot be called for.

The admission of evidence before a Court Martial should be qualified by the following considerations:—

The opinion of a Court of Inquiry or of a Board of Non-commissioned Officers is not evidence.

A summary of evidence is not evidence, in so far as it affects the question of the guilt or innocence of a prisoner. The summary does not consist of statements on oath, and fails to satisfy the rule which requires the best evidence that can be obtained to determine the issue. But when a prisoner is properly found guilty upon his plea of guilty, the summary of evidence as an extract from the Regimental Books is admissible, as showing the incidents and surrounding facts of the offence, as a guide to the Court in awarding punishment. Also

it may be made the ground of examination of a witness as to the inconsistency of his statements made therein with his statements on oath.

The general opinion of a witness, not an expert, is not evidence. Respecting a witness who swore that a soldier "deserted," when he was only aware of his illegal absence, it was held that "witnesses should state facts and not take upon themselves the functions of the Court by drawing conclusions from these facts."

But a witness's estimate of the effect or meaning of a particular transaction that is evident to his senses may be stated.

A statement made by a person not under examination as a witness, is not evidence of the facts so stated. But when such statement is so closely and immediately connected with the offence charged as to be virtually part of the transaction, it is admissible.

A conversation or statement not made in the hearing of the prisoner is not evidence, nor generally is a document to which he is not a party.

A statement that a report or complaint was made is evidence only of the fact that it was so made, and is not evidence of the truth of what is con-

tained therein. Thus, when a witness says "Corporal A reported to me that private B took private C's trousers," it is evidence that a report upon the subject was made, but A's statement, not being on oath, is no evidence that B took the trousers, and should not be admitted.

The character or antecedents of the prisoner as indicating a tendency to commit the offence charged is not evidence except in certain instances, where the charge is for receiving stolen goods, passing base coin, or obtaining money or goods under false pretences, when acts of a similar nature committed on other occasions may be proved under certain conditions.

The admission or confession of one prisoner is not evidence against another. But upon *prima facie* proof that two or more persons are jointly concerned in an unlawful transaction, all acts and statements of one of the parties thereto in furtherance of the common object may be given in evidence against another.

The evidence of an accomplice may be received; but as a rule it is regarded as tainted, and it should not be relied upon unless corroborated in some material respect.

A witness, when under examination, may not read his evidence, but he may refresh his memory by reference to any original document or memorandum made by him (or so far with his cognizance that he knew it to be correct) at the time of, or immediately after, the transaction to which it relates. But this document must be shown to the adverse party, if he requires it, and he may cross-examine upon it.

A party, and especially the prosecutor, may not put to a witness called by himself, a leading question (*i.e.* a question so framed as to suggest or invite the reply desired). He may not put questions to discredit generally his own witness; but he may bring forward proof of the falsehood of any of his specific statements, and may question the witness as to previous statements made by him, which are inconsistent with his evidence.

With regard to an adverse witness, however, the rule is different. A party may call evidence to discredit generally an adverse witness, by producing persons to say that he is unworthy of belief on his oath. But he may not ask the discrediting witness he thus calls, for the ground of his opinion on direct examination. The party



calling the witness whose credit is thus impeached may, however, upon cross-examination, ask these grounds, and may bring forward evidence in reply to show that his witness is worthy of credit.

A witness cannot be compelled to answer a question a reply to which would tend to incriminate him or subject him to any military punishment.

A witness is to be examined by the party calling him, and may be cross-examined by the opposite party and re-examined by the party calling him, provided that the re-examination is confined to matters arising out of the cross-examination, and that the party calling the witness must not use the re-examination merely as a means of supplementing an omission in his direct examination.

The practice which formerly prevailed, of reading the charge over to the witness and then asking him for his statement thereupon, is greatly to be deprecated. In many cases it might be innocuous; but in others it would be most objectionable in the interests of justice. This would be so, for instance, when the issue referred to some particular expressions alleged to be used by a prisoner. By per-



mitting the witnesses to hear the charge read, and thus to have fresh before their minds the precise expressions which it was the object of the prosecutor to prove, the prisoner would be unduly prejudiced. In fact, the reading of the charge in such circumstances would be something in the nature of a suggestion as to the evidence to be given, and, therefore, as much open to objection as a leading question on the part of the prosecutor.

The Court may at any time before the finding (but in open court) recall a witness already examined, either upon their own volition or, if they think proper, at the request of either prosecutor or prisoner, for the purpose of elucidating by further questions any point left in doubt. But neither prosecutor nor prisoner can claim this as a right. In sanctioning it to further the ends of justice, a Court would do well to act upon the principle that the recall of a witness whom the prosecution and defence have already had full opportunity of questioning, should be distinctly for the satisfaction rather of the Court themselves than of either party, and especially not for the purpose of supplying the omission of a prosecutor to prove a material part of his case. For otherwise the Court

would have cast upon them, in a certain sense, the responsibility of the prosecutor; and the prisoner, after he had entered upon and perhaps completed his defence, might be subjected to something in the nature of a fresh prosecution. A witness thus recalled at the instance of the prosecutor would become his witness, and would be open to cross-examination by the prisoner as if he had been called for the first time. If called at the instance of the prisoner, he would in the same manner be open to the cross-examination of the prosecutor, and in either case to re-examination upon matters arising out of the cross-examination.

It is open to a Court to call a fresh witness at any time before the finding, in order to clear up a doubtful point.

As a rule, the evidence of a single witness is legally sufficient to warrant a Court in assuming the existence of the facts sworn to by him, the chief exceptions being as to the falsehood of the matter forming the subject of a charge of perjury or false swearing, and generally the evidence of an accomplice. But in a serious or doubtful question a Court would naturally be cautious in acting upon the unsupported testimony of one person, liable to

errors of perception and memory, not to say bad faith.

A plea of guilty is of itself sufficient to justify a finding of guilty, without regard to any other evidence, provided it is apparent that the prisoner is not ignorant of the full meaning of the plea; as, for instance, when a soldier, pleading guilty to desertion, says in his defence that he intended to return or "never intended to desert." In such a case the man has evidently pleaded in error, and a plea of not guilty should be recorded, and the trial take place thereupon. Rule 35 A should be carefully acted upon when there is the least doubt of the meaning of the prisoner in pleading guilty.

The rejection of evidence tendered by a prisoner in his defence would almost necessarily render a conviction invalid; so would undue restriction of a prisoner in the cross-examination of a witness. Without strong proof that the evidence tendered in the one case and the questions put in the other are quite irrelevant (using the word relevant in its widest sense), a Court is liable to grave error in rejecting either. A question in itself apparently having no connexion, or at best only a remote

one, with the issue may lead up to matter material to the defence.

Cases have arisen where a prisoner, on making his defence, has asked for an adjournment for the purpose of securing the attendance of certain witnesses who, either from the fact of their being at a distance, or from their being persons of high position and discharging important public duties elsewhere, cannot appear before the Court without serious expense or inconvenience. In such a case the Court should endeavour to test the good faith and reasonable character of the request, by eliciting from the prisoner the nature of the evidence such witnesses would probably give. If, on hearing his statement, they are of opinion that the evidence of these witnesses would not be pertinent to the issue, or likely to affect their view of the merits of the case, or to affect it merely in an immaterial degree, they would not err in refusing a demand of this nature, at the same time recording upon the proceedings the request, the refusal, and the reason therefor. If, on the other hand, they are reasonably satisfied of the *bona fides* of the request and the value of the evidence to the prisoner's case, if, in fact, they think it might possibly change their

view of the issue, they ought to give all proper facilities so that the defence may not be unduly restricted, even though either public or private inconvenience may result.

In the case of illegal evidence admitted against a prisoner, if it be material and calculated to prejudice the accused and to influence the Court to convict when otherwise they would have acquitted, the proceedings are thereby rendered invalid. But if it be mere surplusage (the same facts being afterwards legally proved), or if it be immaterial to the issue, the conviction would not necessarily be affected.

Among matters of sufficient notoriety to be presumed in the absence of proof to the contrary are—that

A person apparently serving as a soldier is subject to Military Law.

Every officer or non-commissioned officer is the superior officer of those junior to him in his own rank and of those in inferior ranks.

A command given in connexion with ordinary military duty by a superior to an inferior is a lawful command.

An officer or a non-commissioned officer in quarters is in the execution of his office.

An ordinary military proceeding has been carried on rightly and in the customary manner.

### EXCUSES AND PALLIATIONS.

If a prisoner is proved to be insane at the time of the offence charged, or upon his trial, that fact only is to be found by the Court. When a Court are of opinion that the prisoner did not know the difference between right and wrong in the commission of the offence charged, they should find insanity.

The question has often to be met, how far an offender's guilt is affected by the fact of his being drunk, or suffering from *delirium tremens*, at the time of the commission of the crime with which he is charged. It is difficult to deal scientifically with the proposition that drunkenness is an excuse for crime. Where drinking has been so excessive and continuous as to invade the brain and obliterate the distinctions between right and wrong, as when the disease of *delirium tremens* is induced, then a criminal becomes irresponsible,



and the defence of insanity may be maintained. But if a man in a fit of temporary intoxication kill another, he is as much guilty of murder as if he were sober. It may be that the fit of intoxication deprived him of his reason at the moment when the crime was committed, but English Law does not recognize such a palliation. If it did, a malicious person need only get drunk before executing a possibly long-settled criminal purpose in order to escape the full consequences of his offence. On the other hand, there are certain crimes respecting which the question of intent arises as a distinctive element where intoxication has been allowed to reduce the degree of the offence. Thus, a charge of wounding with intent to do grievous bodily harm has become simply unlawfully wounding, and murder has been reduced to manslaughter, where the violent act has been done in a drunken fit. These mitigations, however, may be said to have resulted rather from the merciful view of the jury than from a strict interpretation of the Law. In applying the theory to those military offences, such as the use of disloyal or insubordinate or threatening language, where the intention forms an element, a similar



view may reasonably be allowed to prevail in awarding punishment for crimes the gravity of which, both from a moral and military point of view, depends much upon the spirit in which they are committed.

There are many cases in which incapacity through physical illness would excuse an offence. Thus, where a prisoner was tried for sleeping on his post and found guilty, but the Court, in recommending him to mercy, expressed their opinion that through illness he was incapable of resisting sleep, it was held that this expression of the opinion of the Court amounted in substance to an acquittal. So when a soldier disobeys a command with which he is physically unable to comply, no offence is committed.

An offence committed under compulsion in certain circumstances is not criminal. Thus, a man joined with or aiding and abetting several others, would be free from the consequences of his act if he could show that it was done by him only because, during the whole time it was being done, he was compelled to do it by threats of immediate loss of life or grievous bodily harm if he refused. Threats of the infliction of such injury

at a future period would not, however, be an exoneration.

Necessity may also be admitted as an excuse or crime where the prisoner can satisfy the Court, that his act was done solely for the purpose, and that it was not carried out further than was necessary for the purpose, of preventing some serious and irreparable evil to himself or to any person whom it was his duty to protect from injury.

Ignorance of the Law is not an excuse for an offence, although there are many instances in which it may properly be taken into account in awarding punishment.

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### DUTIES OF PROSECUTORS.

A prosecutor is bound to prove in substance every essential part of his case. A prisoner is not bound to prove his innocence until the prosecutor establishes by evidence some fact reasonably leading to the inference of his guilt. "No person exercising judicial functions is warranted in inferring a prisoner's guilt from the mere fact that there is no evidence to prove his innocence. Nor has such

person a right to exercise his judicial powers from any information he may have received privately or otherwise than in the shape of legal evidence. Every accused person must be held to be innocent until his guilt is thus established, and the degree of his guilt is what the evidence legally proves and no more."

The duty of the prosecutor is to provide that the evidence necessary to place before the Court in a clear light the facts alleged in the charge is forthcoming, whether it bears in favour of or against the prisoner. It is not his duty, further than the evidence may fairly and reasonably seem to warrant, to endeavour to obtain a conviction.

In his addresses to the Court a prosecutor should not refer to any matters which he cannot prove before the finding, or which have not been proved by legal evidence. He may, however, make observations tending to explain or introduce the facts in a clear, connected, and intelligible way to the Court.

He may inform the Court (if it be the fact) that the trial is held because of the prisoner's exercise of his right to a Court Martial instead of accepting the summary award of his Commanding Officer. This course is not strictly regular, having regard

to the general principle that a Court should be guided alone by the facts bearing upon the issue. But after much consideration it has been sanctioned by the Rules of Procedure, on the ground that it is more likely to work in the prisoner's favour than otherwise in the matter of punishment. But the Court should bear in mind that in coming to a finding they should not permit themselves to be in the slightest degree influenced by the opinion of the Commanding Officer upon the issue, as shown by his summary award of punishment, nor in any case by the opinion of the convening officer as it may be supposed to be implied by his sending the case for trial. In doing so the convening officer does not necessarily prejudge the question of the prisoner's guilt, and may be held to have thereby only indicated his opinion that it was a fit case for inquiry on oath.

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### FORMS OF CHARGES.

Respecting the new forms of charges, it is chiefly necessary to bear in mind that the head of charge

should be framed in the precise words of the section of the Act under which it is preferred, that the statement of particulars should in substance correspond with it, and that the latter should be sufficiently precise, as regards names, dates, and circumstances, to inform the prisoner accurately of what he is called upon to answer. When there is such a divergence between the head of charge and the statement of particulars that, in effect, the former specifies one offence and the latter another, a conviction, even upon a plea of guilty, cannot stand good in law, because the prisoner is virtually called upon to plead to a charge stating two offences in the alternative. Thus, where the head of charge was "Fraudulent Enlistment," and the statement of particulars disclosed the making of a false answer upon attestation, the conviction was held to be bad in law. So, where the head of charge disclosed an offence, but the statement of particulars disclosed no offence, and the evidence proved only the facts alleged in the statement of particulars, the conviction was held bad, even though the prisoner pleaded guilty.

But where an offence under the Act is not stated in the head of charge, but is sufficiently described

in the statement of particulars, the conviction is not necessarily affected. Thus, where the head of charge was "Showing a Defiance of Authority," and the statement of particulars alleged the use of certain specific insubordinate language to a superior, the conviction for the insubordinate language was upheld (the prisoner pleading guilty), on the ground that the prisoner was sufficiently informed what he had to answer; and that the charge under the statement of particulars was a complete charge in itself, the head of charge which disclosed no offence being simply a superfluity not affecting the validity of the proceedings.

Generally it may be held that a charge is not bad which contains (whether under the head of charge or the statement of particulars, or partly in one and partly in the other) an allegation of a specific offence with sufficient particulars to tell the prisoner precisely (1) what accusation he has to answer, and (2) under what section of the Act he is charged.

A single transaction, or set of facts disclosing in substance only one offence, should not, as a rule, be made the subject of more than one charge, unless where, from doubt as to the precise character of the



offence, it is desirable to prefer alternative charges in reference thereto. It was held to be wrong to try a man for failing to appear at a parade held during the period for which he was also tried for being absent without leave. So when men were charged with (1) stealing, and afterwards (2) fraudulently selling the same articles, it was held that the selling being but an incident of the stealing, ought not to have been made the subject of a separate charge. But I think it is unobjectionable to try a man for (1) quitting his post, and (2) deserting, even though the two offences originate in the one act.

These new forms of charge, although sanctioned by the Rules of Procedure, and therefore proper to be adopted, are not essential. Indeed, in some of the simpler kinds of offence, like drunkenness and insubordination, I venture to think they involve a needless, if not a hazardous repetition. It is absolutely necessary, however, that a charge, whatever may be its form, must (1) disclose an offence under some section of the Army Act, and (2) with sufficient particulars of time, place, and circumstances to enable the prisoner fully to understand the accusation against which he has to defend himself.

The practice is to be deprecated of incorporating in a charge particulars which are not part of the offence, although subsidiary to it. Thus, in a charge of breaking out of barracks, or of absence without leave, there is no reason for adding that the prisoner remained absent till apprehended on the following day, or as the case may be. These attendant circumstances may be, and often are, properly proved in evidence; but it is not desirable that the charge should contain any allegation that is not an element of the offence charged.

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### MILITARY STATUS.

A non-commissioned officer who has been reduced to the ranks, but whose reduction is afterwards pronounced to be invalid in law, is nevertheless liable to all the incidents of the position of a private soldier in the interval, and any punishment inflicted upon him in respect of an offence committed while he is thus apparently a private is as valid, and may be carried out, as if he were legally a private. A sergeant was tried by Regimental Court Martial and reduced to the rank of corporal. Shortly afterwards,

while serving as corporal, he committed another offence, for which he was sentenced to be reduced to the ranks and fifty-six days' imprisonment. On the first Court Martial being submitted to the Judge Advocate-General (after the commission of the second offence), the conviction was pronounced illegal. But it was held that under the second and legal sentence the man had lost the position of a non-commissioned officer, and had no claim to be reinstated.

Generally it may be laid down that a military person may be dealt with as filling the position in which he is apparently serving at the time, although from the date of the gazette, or for other reasons, he may strictly speaking have at the moment a different status.

A non-commissioned officer accepting a commission becomes liable to all the incidents of the new position which, it is to be presumed, he voluntarily accepts. He can be tried for any offence committed by him while in the ranks or as a non-commissioned officer, to the same extent as if he had remained in those positions. But he can only be tried by a General Court Martial, and sentenced to the punishments applicable to an officer.

A non-commissioned officer tried after his discharge (under Section 158) cannot be dealt with as a non-commissioned officer, but as a private.

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### CONDONATION.

This is a subject upon which much misapprehension prevails. It is conceived by many that putting arms into a prisoner's hands or employing him upon any duty, amounts to a condonation exempting him from the consequences of any crime which he may be known to have committed. This is an error. Condonation, to have this effect, must be the deliberate act, in his magisterial capacity, of the person having power to dispose of the offence. It must be an intentional act of forgiveness, not done through misapprehension of the facts of the offence, nor inadvertently, nor through regard for the exigencies of the service. Where a hospital sergeant, accused of embezzling certain stores, was released from arrest and resumed his duties, there being no other person at the time available to discharge them, it was held not to be condonation. So in the case of







tion, or by the well understood custom of the service, or the requirements of the case, as applicable to the position in which he was placed at the time. It must be a military misbehaviour. If the conduct became misbehaviour, such as failing to advance against the enemy, from the mere fact that the accused (say through the death of a superior officer) had just succeeded to the command of a body of troops, it is necessary to show, not only that he was in command, but that he knew that he was in command at the moment, and that the duty of ordering the advance rested upon him.

## SECTION 5.

## HEADS OF CHARGE.

- 1.) When on active service, { without orders from his superior officer, leaving the ranks } in order to secure prisoners.  
in order to secure horses.  
on pretence of taking wounded men to the rear.
- (2.) When on active service { destroying } property without orders from  
vice, wilfully { damaging } his superior officer.
- (3a.) When on active service, { by want of due precaution.  
being taken prisoner } through disobedience of orders.  
through wilful neglect of duty.
- (3b.) After being taken prisoner when on active service, failing to rejoin Her Majesty's service when able to rejoin the same.
- (4.) When on active service, without { holding correspondence with } the enemy.  
due authority { giving intelligence to }  
sending a flag of truce to
- (5.) When on active service { by word of mouth } spreading reports  
in writing { calculated to } alarm.  
by signals { create unneces- } despondency  
[otherwise] { sary }

- (6.) When on { in action  
active { previously to going } using words } alarm.  
service { into action } create } despondency.

The offences specified in this section are all incidental to service in the field, and regarding them it is only necessary to observe that the head of charge should be in the words of the Act, that the statement of particulars should conform thereto, and that the evidence must prove in substance every part of the head of charge.

## SECTION 6.

## HEADS OF CHARGE.

- (1A.) [When on active service,] leaving his commanding officer to go in search of plunder.
- (1B.) [When on active service,] { guard  
picquet } without orders from his  
leaving his { patrol } superior officer.  
post
- (1C.) [When on active service,] forcing a safeguard.
- (1D.) [When on active service,] { forcing } a soldier when acting as  
striking } sentinel.
- (1Ea.) [When on active service,] { the provost  
impeding } an assistant  
provost-marshall.  
an officer  
a non-commissioned officer  
[other person] } legally exercising authority { under (on behalf of) } the provost  
marshal.

- (1Eb.) [When on active service, and] when called on, refusing to assist in the execution of his duty
- the provost-marshall.  
an assistant provost-marshall.  
an officer  
a non-commissioned officer  
[other person]
- legally exercising authority (under (on behalf of) the provost marshal.
- (1Fa.) [When on active service,] doing violence to a person bringing provisions supplies to the forces.
- (1Fb.) [When on active service,] committing an offence against, the
- property of an inhabitant of a person of a resident in
- the country in which he was serving.
- (1G.) [When on active service,] breaking into a house [other place] in search of plunder.
- (1H.) [When on active service,] by
- discharging firearms  
drawing swords  
beating drums  
making signals  
using words  
[any means whatever]
- intentionally occasioning false alarms
- in action.  
on the march.  
in the field.  
[elsewhere].
- (1Ia.) [When on active service,] treacherously making known the
- parole watchword countersign
- to a person not entitled to receive it.
- (1Ib.) [When on active service,] treacherously giving a
- parole watchword countersign
- different from what he received.
- (1J.) [When on active service,] irregularly
- detaining appropriating to his own detach-ment
- (contrary to orders issued in that respect)
- provisions supplies
- proceeding to the forces.
- (1K.) When a soldier acting as sentinel [on active service],
- sleeping on his post.  
being drunk on his post.  
leaving his post before he was regularly relieved.

- (2A.) By {  
 discharging firearms  
 drawing swords  
 beating drums  
 making signals  
 using words  
 [any means whatever]  
 } negligently {  
 in action.  
 on the march.  
 in the field.  
 [elsewhere].  
 }  
 occasioning false alarms
- (2Ba.) Making known {  
 parole  
 watchword  
 countersign  
 } to a person not entitled to receive it.
- (13b.) Without good and sufficient cause {  
 parole  
 watchword  
 countersign  
 } different from what he received.

Respecting the offences provided for in this section which are more peculiarly incidental to active service, I shall merely say that the evidence should prove every essential part of the offence as stated in the head of charge, and in the words of the Act.

The crimes usually coming before a court martial are those specified in 1B, 1C, 1D, and 1K, respectively.

As to 1B and 1K, a doubt has arisen whether a sentry not regularly posted (who, for instance, posted himself owing to the negligence of the non-commissioned officer of the guard) is liable to trial on these charges. It has been ruled that the fact of his not being regularly posted is immaterial. He is liable to all the penalties for these offences, if, being one of the guard or body furnishing the sentry for the post, he has in any way undertaken the duty of sentry.

For the purposes of 1D and 1K, a non-commissioned officer fulfilling a duty in the nature of that of a sentinel, who, for instance, is on gate duty, is "acting as sentinel."

A party of soldiers escorting a prisoner is a "guard."

A soldier commits an offence who leaves his post, etc., even for a morally meritorious purpose such as putting out a fire. But it is difficult to conceive circumstances which would equitably justify his trial.

## SECTION 7.

### HEADS OF CHARGE.

- (1.)  $\left\{ \begin{array}{l} \text{Causing} \\ \text{Conspiring with other} \\ \text{persons to cause} \end{array} \right\} \left\{ \begin{array}{l} \text{a mutiny} \\ \text{sedition} \end{array} \right\} \left\{ \begin{array}{l} \text{in forces} \\ \text{belonging} \\ \text{to Her} \\ \text{Majesty's} \end{array} \right\} \left\{ \begin{array}{l} \text{regular forces.} \\ \text{reserve forces.} \\ \text{auxiliary forces.} \\ \text{navy.} \end{array} \right.$
- (2a.) Endeavouring to seduce a  $\left\{ \begin{array}{l} \text{regular forces} \\ \text{reserve forces} \\ \text{auxiliary forces} \\ \text{navy} \end{array} \right\}$  from allegiance to Her Majesty.
- (2b.) Endeavouring to persuade a person in Her Majesty's  $\left\{ \begin{array}{l} \text{regular forces} \\ \text{reserve forces} \\ \text{auxiliary forces} \\ \text{navy} \end{array} \right\}$  to join in  $\left\{ \begin{array}{l} \text{a mutiny.} \\ \text{sedition.} \end{array} \right.$
- (3a.) Joining in  $\left\{ \begin{array}{l} \text{a mutiny} \\ \text{sedition} \end{array} \right\}$  in forces belonging to Her Majesty's  $\left\{ \begin{array}{l} \text{regular forces.} \\ \text{reserve forces.} \\ \text{auxiliary forces.} \\ \text{navy.} \end{array} \right.$
- (3b.) Being present at and not using his utmost endeavours to suppress  $\left\{ \begin{array}{l} \text{a mutiny} \\ \text{sedition} \end{array} \right\}$  in forces belonging to Her Majesty's  $\left\{ \begin{array}{l} \text{regular forces.} \\ \text{reserve forces.} \\ \text{auxiliary forces.} \\ \text{navy.} \end{array} \right.$

(4.) After coming to the knowledge of	{ an actual mutiny an intended mutiny actual sedition intended sedition }	in forces belonging to Her Majesty's	{ regular forces reserve forces auxiliary forces navy }	{ failing to inform without delay his commanding officer of the same.
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Mutiny may be described as the act of two or more soldiers who join together, whether actively or passively, in resistance to or disobedience of lawful authority. It is not necessary to prove previous or express concert, provided it is shown beyond reasonable doubt that the accused are, before or at any time during the resistance or disobedience, so conducting themselves as to manifest a common purpose in the matter.

Each one of a body of men not marching, or not coming from their barrack room when duly ordered, is guilty of mutiny, if he cannot show that his disobedience was occasioned solely by reason of compulsion.

Sedition in military life may be taken as meaning a proceeding falling short of actual mutiny in respect of direct resistance or disobedience, but of a mutinous tendency, and it includes any tumultuous or disorderly assemblage, demonstration, or other manifestation for the purpose of subverting or



interfering with superior authority. For instance each one of a number of men going in a body to a superior in a menacing manner in order to induce him to release a prisoner, or mitigate his punishment, joins in a sedition.

The head of charge should be in the words of that part of the section which is applicable to the particular facts of the offence charged, the statement of particulars should correspond therewith, and the evidence must prove the essential portions of the head of charge.

The acts and statements of one prisoner, from the time at which there may be some evidence to show him to have been acting in concert in the matter with others, may be given in evidence against all those with whom he is so shown to have been acting in concert.

### SECTION 8.

#### HEADS OF CHARGE.

[When on active service]	{ striking using violence to offering violence to using threatening language to using insubordinate language to	} his superior officer [being in the ex- ecution of his office]
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In that he [or in having] at on the struck Sergeant A B  
 (with his clenched fist, or with a stick, as the case may be).

In the case of striking, the first thing to prove is

(1) that the prisoner struck Sergeant A B in the manner stated. But if the evidence shows that the blow was struck in some other way, or with some other weapon, or where it is alleged to have been struck with a weapon, without one, the Court may convict, specifying the difference in their finding, or where the weapon or manner of striking cannot be clearly established, omitting the statement in the charge to that effect. Thus (a), "The Court finds the prisoner guilty of the charge, except that the blow was struck with a walking-stick, and not with a poker as stated therein;" or (b), "The Court finds the prisoner guilty of the charge except as regards the words, 'with his clenched fist.'" A finding in either of these forms would be legal, inasmuch as it still declares the prisoner to have committed the full offence stated in the Act.

(2) That Sergeant A B was his superior officer does not require specific proof, the superiority of a person of one military grade above another of inferior grade being a matter of notoriety which may be presumed. A private soldier while placed temporarily in command of a guard becomes a superior officer of the other privates, as if he were a non-commissioned officer.

(3) That the prisoner knew the person struck was his superior officer. In ordinary circumstances, in barracks, camp, or their neighbourhood, this fact would be hardly necessary to prove by evidence, the fact of the superior wearing the insignia of his rank, the personal knowledge of the prisoner from previous acquaintance that he was his superior, or the circumstances generally, being a sufficient presumption to warrant the Court in considering this point established. But where the person struck was not dressed according to his rank and was not known to the prisoner, it is for the Court to say, upon a consideration of the facts disclosed in evidence, whether the prisoner was aware of the superior rank of the person struck. Should it not reasonably appear that he was so aware he should be acquitted, the intention in this respect being an essential part of the offence charged. A private attempting to strike another private, but accidentally striking a superior instead, would not, I think, be liable to conviction under this section.

(4) That the sergeant was then in the execution of his office. It may be presumed that a superior officer in or about a military quarter, and in uniform, is in the execution of his office. Even beyond

such a quarter he would become in the execution of his office by the due exercise of military command. A sergeant telling a disorderly soldier to return to barracks would be in the execution of his office. Also an officer in plain clothes, if the soldier had reasonable cause for knowing that he was an officer. Two soldiers met an officer in plain clothes in the dark, and assaulted him; he then ordered them to desist, stating that he was Lieut. —, of the Royal Artillery (the soldiers belonging to a Line regiment in the same garrison), whereupon they said they did not care, and continued to assault him. It was held that by continuing to strike him after he had stated he was an officer, and the soldiers had reasonable cause to believe him to be an officer, the offence was established, and both soldiers were awarded penal servitude. The evidence upon this point should, however, be weighed carefully, as it does not necessarily follow that a soldier is bound to believe the statement of every person in civilian garb who tells him that he is an officer.

Offering violence to his superior officer [being in the execution of his office],

In having [or in that he] at                      on the                      rushed at and attempted to strike with a stick [or otherwise] Sergeant A B [being in the execution of his office].

The observations respecting the first form apply generally to this charge, and it is only necessary to say that an offer of violence is to be interpreted as an attempt at violence, *i.e.* some act which, if completed, would constitute actual violence. A conviction would be justified by evidence that the prisoner's arm was uplifted to strike in such a way that he would have struck the superior, if the arm had not been seized, or some other obstacle had not intervened to prevent the completion of the blow. It is necessary to show an actual attempt. Thus a physical menace, like a man shaking his fist, or squaring at a sergeant at such a distance that his striking him was an impossibility, would not justify conviction under this section. But throwing a missile, or pointing a loaded firearm, would, on proof that a superior was the person aimed at, even though the superior named in the charge was not the particular superior shown to have been aimed at. A soldier tried on a charge of offering violence against Sergeant A B, and proved to have thrown a stool at Sergeant C D, in circumstances which would have made it an offence against C D, may be legally convicted, by amending the finding in accordance with the evidence.

But to render these special findings legal it is necessary that the prisoner shall not be surprised by the new evidence and thereby prevented offering such defence as he might.

A prisoner may urge that the violence or attempted violence was in self-defence. If it be shown that it was necessary, or that at the moment he had reason to believe it was necessary, for his actual protection from injury, he is legally justified in resisting, and he should be acquitted; but unless this reasonably appears from the evidence, the fact that the superior struck the prisoner first would not legally exonerate him. This, or any other kind of provocation, would tend to mitigate the punishment, and evidence thereupon should be freely admitted. In a case where an inferior struck a superior a severe blow with a riding-whip, the accused asked a question in cross-examination tending to show that just before the blow was struck he had discovered that his wife had been guilty of infidelity with the superior. The Court refused to allow the question on the ground that the matter had nothing to do with the case. But this refusal caused the sentence to be annulled, because it was a fact having an important bearing upon the amount of punishment to be



awarded, and should have been therefore admitted in evidence. But its exclusion would not affect the finding merely, as it could be considered only a palliation, not an exoneration.

When this offence is tried by District Court Martial I recommend the omission of the words, "being in the execution of his office," as unnecessary, and possibly leading to complication. The Court having the facts before it can pass a sentence adequate to the nature and degree of the offence. As regards a charge with these words omitted the above observations (except paragraph 4) are equally applicable.

When on active service,] using threatening language to his  
superior officer,  
In having [or in that he] at \_\_\_\_\_ on the \_\_\_\_\_ said to Sergeant — " \_\_\_\_\_ " or words to that effect.  
[When on active service,] using insubordinate language to his  
superior officer,  
In having [or in that he] at \_\_\_\_\_ on the \_\_\_\_\_ said to Sergeant  
A B " \_\_\_\_\_ , " or words to that effect.

The omission in the charge of the particular language, or its substance described as "insubordinate," or "threatening," renders the charge bad from vagueness, the prisoner not being informed what he has to answer, and being thereby prejudiced as regards such defence as he might have to offer.

To justify a conviction it is essential to prove—

That the prisoner used the exact words specified, or words to that effect and that they constituted a threat or an expression distinctly and deliberately disrespectful in itself or disrespectful by reason of the tone or manner in which they were uttered, or the gestures by which they were accompanied.

That they were addressed to a superior. For this purpose it will be enough to show that they were used in order that they might be heard by the superior, of whose presence the accused was aware, even though they were not used in the second person. "I'll kill that Sergeant A" would be sufficient if it were shown that the prisoner knew that Sergeant A was within hearing. Nor is it necessary that the words should name the person addressed. "I'll do for that fellow who has just confined me" would justify a conviction on a charge of using these words to Sergeant A B, if it were proved that Sergeant A B had just confined the prisoner, and that the words were used apparently with an intention that he should hear them.

It is a question whether the word "insubordinate" would not suffice for all charges as above. I cannot imagine any threatening language which would not be also insubordinate if used to a military

superior. I do not recommend a charge for threatening or insubordinate words where, as is frequently the case, they accompany violence, or an attempt at violence, to a superior. In such a case they are but incidents of a far more serious offence, and although proper to be proved in evidence for the purpose of showing the intention, they ought not to be charged either separately or as incorporated in the charge of violence.

A prisoner may show that the words did not really constitute that insubordinate intent which this section must be understood to imply. A man playing some game with a superior, or "chaffing" another soldier of a rank perhaps only just above his own, might offend against the letter of Section 8, but not against its true meaning and intent, namely, to protect superiors from deliberate violence or serious insult from those over whom it may be their duty to keep a tight hand in the interests of discipline.

A soldier awarded by his Commanding Officer a punishment from which he has, or believes he has, a right to appeal to a Court Martial, who says, "I shall not do it," does not necessarily commit an offence under this section if it appears that he only means to signify his wish to appeal. In such a

case a sensible Commanding Officer would not at once proceed to put the worst construction upon his words, but would ascertain if he thereby intended only to express his wish to appeal.

When a soldier is on his defence before either the Commanding Officer or a Court Martial, his statements are so far privileged that language which might be in other circumstances insubordinate would not be so then if expressed *bonâ fide* for the purpose of his exculpation.

It has been laid down that "expressions, however offensive to a superior, that are used (1) in the course of a judicial inquiry, (2) by a party to that inquiry, and (3) upon a matter pertinent to and *bonâ fide* for the purposes of that inquiry, as, for instance, the credibility of a witness, are privileged, and cannot be made the subject of a criminal charge." It is to be noted that this does not include language used gratuitously or wantonly, or not for the purposes of the inquiry.

#### SECTION 9.

##### HEADS OF CHARGE.

Disobeying in such a manner as to show a wilful defiance of authority, a lawful command given personally by his superior officer [in the execution of his office],

In having [or in that he] at                      on the                      when ordered to  
stand at attention by Sergeant A B, failed to do so.  
[When on active service,] disobeying a lawful command given by  
his superior officer,  
In having [or in that he] at                      on the                      when ordered by  
Sergeant A B to make his bed, failed to do so.

These two forms relate not so much to different offences as to different degrees of the same serious military offence, disobedience. The second, of course, includes an offence under the first, and there is but little that is essential to a conviction under the one that is not also essential to a conviction under the other. In each case the disobedience must be wilful, and therefore, in a certain sense, defiant of authority. In each case the command must be a lawful military command; that is to say, an order in relation to military duty; and I venture to think (although it is not so expressed in the second form) in each case the command must be given "in the execution of his office," for I can hardly conceive a legitimate military command relating to a military duty, given by a superior to an inferior, that must not necessarily be given by the former in the execution of his office. The principal distinction appears to be that, whereas in the first the command must be given then and there, and personally, in the second it may be only

proximate, and may be conveyed through a deputy authorized in that behalf. Unless in extremely aggravated cases, where, for instance, the disobedience may involve serious consequences in war, requiring an example, or where it is accompanied with insulting gestures or language, or something showing an open defiance of authority, I recommend that the simpler form should be adopted.

When the first form is used it is essential to give evidence, either by direct proof or by facts not admitting of a reasonable doubt to the contrary—

- (1) That the command was lawful and in relation to a military duty;
- (2) That it was given to the prisoner then and there personally by a superior in the execution of his office;
- (3) That it was disobeyed and in a defiant manner.

Where the second form is adopted it is necessary to show in the same manner—

- (1) That the command was lawful, and related to military duty;
- (2) That it was given to the prisoner either then and there, or proximately, by a superior empowered to give it, either in person or by a deputy duly authorized to convey such



command, according to the usages of the service;

- (3) That it was actually disobeyed wilfully. The mere fact of a refusal in words does not necessarily mean actual non-compliance, which must be proved. A soldier, who on being ordered by a superior officer to do something the next morning, says, "I'll see you hanged first," does not commit an offence under this Section, although he does under Section 8.

A lawful command is difficult to define, but generally it may be described as a command relating to military duty, given by a superior within his duty and province. If it be unlawful, the inferior who obeys it would not be absolved from his liability to the Civil Power by the fact of his military obligation to do what his superior ordered him. Where the disobedience arises from an honest belief that the command is not lawful and that the consequence of obedience will be unlawful, a charge under the first form (or, I think, under the second) would not hold good. There are, however, few commands given by a military superior in relation to the discharge of

military duty which may not be considered so far lawful, that disobedience by an inferior is a matter of grave risk and responsibility. Even under the second form the disobedience must be intentional and immediate, or at least so proximate to the command as to forbid the assumption that it arose from neglect or forgetfulness, or, still more, from misapprehension or error of judgment. The command must be distinctly of a military character, and not in relation to domestic or civilian matters. An order given to a soldier (even a servant) upon such matters would not be a command. It is only in military affairs that implicit obedience is of such vital consequence that death is the penalty for disobedience. For this purpose the soldier is the servant of the officer, not personally, but in his capacity as representative of the Queen, and the embodiment of her authority on the spot. Many cases must occur in which it is difficult to draw the line as regards the application of this section. But the best principle is to be guided by the answer to the question—Is the disobedience of a character to impede, delay, or defeat the performance of public military duties? One of the nearest illustrations I know of is the case of a soldier told

by an officer to fetch his horse from the stable. If the horse were his charger, and he wanted it for military duty, the soldier disobeying the order would fall within the meaning of this section. If, on the other hand, the officer were in plain clothes or hunting costume, and he wanted his horse for a non-military purpose, it would not be a lawful command, and the soldier would not be amenable to the Army Act for disobedience thereof. In any instance where the military nature of the command is reasonably open to such doubt a conviction should not take place under this section.

Religious scruples do not furnish a ground of exculpation under this section.

An officer, a Protestant, who had conscientious scruples about attending the service in a Roman Catholic Church, disputed the lawful character of the command, which directed him to remain in the church during the service with the Roman Catholics under his command. It was decided that the command was lawful. "An officer detailed to command a party of Roman Catholic or Presbyterian soldiers attending their place of worship, is on a duty which is strictly and purely military. He is on a parade, which lasts without intermission

from the time he marches from, to the time he returns to quarters, and thus he is told 'to remain with his men, during the performance of the service.' He is in command the whole of that time, and therefore must be constantly in a position to control his men, to have them in his sight, to preserve discipline and order, and further to withdraw the men if seditious or disloyal language be introduced."

An old soldier (private) when placed in temporary command of a guard or party, in the absence of a non-commissioned officer, is a superior officer in relation to the other soldiers of the party, for the purposes of this section.

## SECTION 10.

## HEADS OF CHARGE.

When concerned in a	{ quarrel fray disorder	{ refusing to obey striking using violence to offering violence to	{ an officer who or- dered him into arrest,
In having [or in that he] at		on the	being then con-
cerned in a	{ quarrel fray disorder [as the case may be]	{ refused to obey [state facts]	Lieu-
tenant			
Lieutenant.		on being ordered into arrest by the said	

This is a charge which I apprehend will be very seldom resorted to. It is applicable only to an officer. To prove it, it is essential to show that—

1. The prisoner was at the time concerned in a quarrel, fray, or disorder, as charged.

2. That he refused to obey, struck, used violence to, or offered violence to, as stated in the charge, the officer mentioned; and as I think :

3. That the circumstances of the fray were such as to justify the command of the inferior, either for the preservation of discipline or the safety of those concerned; it being obvious that a superior is not bound to obey an inferior, where the intervention of the latter is not reasonably necessary.

Striking  
Using violence to } a person in whose custody he was placed.  
Offering violence to }  
In having [or in that he] at on the [state the facts]  
Corporal A. B. in whose custody he was then placed.

This charge is practically unnecessary, inasmuch as the offence it discloses is punishable by ordinary law under Section 41 (5). It must, however, be charged under Section 10. But where the offender is an officer, a conviction would enable a Court Martial to pass a sentence of cashiering.

Resisting an escort whose duty it was to { apprehend him.  
have him in charge.  
In having at on the [state the facts].

It is essential to prove (1) the resistance, which may be either direct violence, or passive resistance,

such as lying down and refusing to move, with a physical ability to do so.

2. That it was a duly constituted escort, told off for the purpose of guarding the prisoner.

The resistance in any case must be wilful, and not arising from misapprehension or inability to comply with orders.

Breaking out of { camp.  
barracks.  
quarters.

In having [or in that he] at on the [state the facts].

1. That it was the duty of the prisoner to be in barracks at the time.

2. That he left the barracks, etc., forcibly, stealthily, by artifice, or otherwise without proper authority.

The offence "breaking out of quarters," is to be distinguished from breaking out of barracks. It chiefly relates to the case of a man leaving one part of a barrack for another, where he had no right to be at the time.

## SECTION 11.

### HEADS OF CHARGE.

Neglecting to obey a { general  
garrison  
regimental  
detachment  
guard  
[or other] } order.



In having [or in that he] at \_\_\_\_\_ on the \_\_\_\_\_ day  
 of [state facts] in contravention of garrison order No. \_\_\_\_\_  
 of the \_\_\_\_\_ day of \_\_\_\_\_

It is necessary to prove—

1. The order. (By its production or, if it be lost, by secondary evidence.)

2. That the act of the prisoner constituted an infraction of the order.

There is a difference between this offence and disobedience of a command to do a specific act. The latter relates to non-compliance with either a verbal or written order, given at the moment or so proximately as to show deliberate disobedience; whereas an offence under this section means disregard of a standing order having a continuous operation, even though the neglect arose from forgetfulness or ignorance, but not (as I think) from reasonable misapprehension. Generally a want of clearness or distinctness in the order ought to be taken into account in determining the question whether the act was a neglect or merely a misapprehension.

This section does not apply to non-compliance with an order to do something specific at a future time, which may proceed from forgetfulness or

negligence. This would properly be charged as a neglect under Section 40.

Ignorance of the order is not an exoneration, although of course it should greatly lessen the punishment, or prevent the case being sent for trial in most instances.

## DESERTION.

### SECTION 12.

#### HEADS OF CHARGE.

When on active service	} deserting Her Majesty's service.
When under orders for active service	
In having [or in that he] at on or about the	
absented himself without leave from the regiment, with	
an intention of not returning to military duty (or some fact or	
circumstances showing that intention).	

Desertion, speaking generally, means a permanent abandonment of military service, and it is therefore necessary to prove not only (1) the absence (2) without leave of the commanding officer, or of some officer whom the prisoner might reasonably believe to be empowered to grant the leave; but (3) some fact or circumstance justifying the inference that the prisoner intended not to rejoin the army.

It is to be noted, however, that absence without leave for the purpose of avoiding active service or

embarkation for foreign service is held to be so far an abandonment of the essential and serious work of military life as to constitute desertion.

Should the evidence not sustain (3) the charge ought to be absence without leave only. The fact of re-enlisting in another corps would manifestly render (3) inappropriate, as a man cannot be deemed to have permanently abandoned the service who rejoins it, however unlawfully. To establish (3) length of time and distance, a declared intention of permanently quitting the service, being found on his way to a foreign or distant country, the disuse of military clothing, or the obliteration of identifying marks thereon, are among the circumstances to be considered as leading to the inference necessary to justify conviction. The wearing of plain clothes, although perhaps sometimes a strong element in the case, would not always justify the inference, inasmuch as it might appear that they were worn for a temporary purpose, or in consequence of the uniform having been stolen; while in the case of a soldier-servant whose ordinary clothing would be civilian, it would be valueless as a proof of an intention of remaining away permanently. The Court should carefully weigh the

question whether the facts proved show this intention or not, and if they do not, they should avail themselves of the power given them by Section 56 (3) of the Act, and convict for absence without leave only.

A trial for desertion may take place at any time beyond the usual limit of three years after the commission of the offence. But a charge of making away with, or losing by neglect, kit, etc., whether incorporated in the charge of desertion or preferred separately, cannot be adjudicated upon unless within three years of the commission of the offence.

The word desertion is erroneously regarded by some persons as illegal absence of any kind. For this reason it is especially desirable that when a prisoner pleads guilty to a charge of desertion, the Court should comply fully and carefully with the direction contained in Rule of Procedure 35A, and ask him whether by pleading guilty he advisedly admits that he not only absented himself, but did so with the intention of permanently abandoning the service. If he answers in the negative, and says in effect that he was absent without leave only, the Court should enter a plea of not guilty to the charge of desertion and proceed to take evidence.

A militiaman, although not otherwise subject to military law, who without leave, sickness, or other reasonable cause, fails to appear for permanent embodiment may be tried by Court Martial, and convicted of desertion or absence without leave, as the evidence may warrant. If he similarly fails to come up for training, he may be so tried and convicted of absence without leave under the Militia Act, 1882.

When on active service	} attempting to desert Her Majesty's service.	
When under orders for active service		
In having [or in that he] at ship then bound for New York, with a passenger ticket for that port in his possession.	embarked on board a	
When on active service	} a person subject to military law to desert from Her Majesty's service.	
When under orders for active service		
In having [or in that he] at particulars with precision].		
	persuading endeavouring to persuade procuring attempting to procure	on the [state

The maximum punishment for any of these offences is, for the first offence committed not upon active service, imprisonment; or if the prisoner has been convicted previously, or at the same trial, of another act of desertion or fraudulent enlistment, penal servitude may be awarded; if upon active service, death. A mere intention of deserting does not constitute an attempt to desert. To establish a charge the prosecutor must prove some act which,

if completed would be desertion; *i.e.* a permanent abandonment of Her Majesty's service. It is for the Court carefully to weigh whether the probable and natural consequence of the act done would be permanent or only temporary absence, and if the latter to acquit.

## SECTION 13.

## HEAD OF CHARGE.

Fraudulent enlistment.

- (a) In having [or in that he] at the value while belonging to the { regular forces, viz. militia when embodied, enlisted in Her Majesty's regular forces, [thereby obtaining a free kit, value ], or
- (b) In having at belonging to the { enlisted in } the militia. { enrolled in } the royal navy. { entered } on the while regiment of the regular forces,

It is necessary to prove, 1. the enlistment forming the subject of the charge, (1) by the attestation paper or a copy thereof, with proof of identity, or (2) by direct evidence that the prisoner so enlisted.

2. That the prisoner at the time of such enlistment belonged to the regular forces or was otherwise subject to military law, as stated in the charge. Being in the militia when not embodied permanently, or in the reserve, is not sufficient for the



purposes of this section, but it subjects the offender to Section 33.

The maximum punishment for the first offence is imprisonment, but if previously, or at the same trial, convicted of another act of fraudulent enlistment or desertion, penal servitude. The absence from his proper corps next preceding the fraudulent enlistment, is not a previous instance of desertion. In fact it should not be charged as desertion, the circumstance of the prisoner having again enlisted forbidding the assumption that on that occasion he intended to abandon Her Majesty's service.

Fraudulent enlistment may be tried beyond the three years' limit prescribed for most offences, but where the obtaining of a free kit is incorporated in the charge, a sentence of stoppages will not hold good if three years have elapsed between the offence and the trial.

The issue of a free kit may be proved under Section 163 (*g* & *h*), by a copy of record thereof in the regimental books.

By the Reserve and Militia Acts of 1882, men of the army reserve and militiamen, although not otherwise subject to military law, are liable to trial by Court Martial for fraudulent enlistment and

similar offences in the following manner according to the different circumstances.

A person enlisting in the regular forces, or the militia, or the reserve forces, or entering the royal navy, if then belonging to the militia, when either permanently embodied or if on service as part of the regular forces, is liable to trial for fraudulent enlistment; if belonging to the militia not permanently embodied, to any other auxiliary force, or to the reserve not called out, he is liable to trial only for making a false answer upon attestation.

#### SECTION 14.

Assisting a person subject to military law to desert Her Majesty's service.

In having at                      on the                      [state the circumstances].

It is necessary to prove (1) some act constituting assistance to (2) a person subject to military law, (3) who was attempting to desert, or was in the act of desertion, or had deserted, on the occasion on which such assistance was given by the prisoner, and (4) that the assistance was given with the knowledge that it was for the purpose of the desertion. The mere act of giving some assistance to a person who turned it to account for deserting, would not justify a conviction.

## CHARGE.

Being (the desertion  
cogni- { the intended  
sant of { desertion

{ of a person  
subject to  
military  
law not  
forthwith

{ giving notice to his command-  
ing officer.  
taking some  
steps in his  
power to  
cause the

{ deserter } to be  
intending } appre-  
deserter } hended.

In having at on the [state particulars].

It is necessary to prove—

1. The cognizance of the prisoner of
2. The desertion or intended desertion.
3. The fact of the deserter, or intending deserter,  
being subject to military law.
4. The non-giving of notice to the Commanding  
Officer, or

The steps not taken, and

5. The power of the accused to take these steps, and
6. That these steps would have tended to the ap-  
prehension of the deserter.

## SECTION 15.

## HEAD OF CHARGE.

- (1.) Absenting himself without leave.

In having at without leave, absented himself  
from the { barracks.  
regiment.  
detachment.

It is necessary to prove—

1. The absence.
2. That the prisoner had not leave from his Com-

manding Officer or from some person whom he might reasonably suppose to be then authorized to give him permission to be absent.

The absence must be from the regiment or body of troops to which he belongs, or from the barrack, garrison, camp or station where it is his duty to be. Absence from one particular part of a barrack to any place within (so to speak) the same military atmosphere, would not warrant a conviction, to justify which it is essential that the absence must be from the military cognizance and supervision to which the prisoner is properly and ordinarily subject at the time.

It was formerly ruled that a soldier was liable for involuntary absence, such as detention in custody arising from voluntary absence. Upon consideration however, this has been reversed, and a soldier is now liable to penalties in respect only of the time during which he voluntarily absents himself.

A militiaman, although not otherwise subject to Military Law, is liable to trial by Court Martial and conviction for absence without leave, for failure without leave, or sickness, or reasonable cause to come up for training.

- (2.) Failing to appear at the { parade } appointed by his com-  
place of { rendezvous } manding officer.
- (3.) Without leave, before he { parade } appointed by his com-  
was relieved, going { rendezvous } manding officer.  
from the place of
- (4.) Without urgent necessity, quitting the ranks.
- (5.) { When in } { beyond the } orders without a  
camp { limits fixed } pass or written  
When in } being { by } leave from his  
garrison found { in a place } general  
When [elec-] prohibited { [other] } commanding  
where] by officer.
- (6.) Without leave from his commanding officer or due cause ab-  
senting himself from school when duly ordered to attend there.

Respecting the statement of particulars in each of these instances it will be enough to say that facts must be stated with precision, which show that the full offence specified in the head of charge has been committed. In the case of (2), the particular parade should be described, and it should be proved that the prisoner ought to have attended that parade, either in consequence of a special or general order or by well understood custom. In the case of (5), the place in which the prisoner was found must be specified, and it must be proved in evidence to be the same as that prohibited in the order, which (either original or certified copy) must be produced. The same considerations that apply to Section 11 would apply to this offence. A prisoner would not be exonerated by forgetfulness or ignorance, but he would, I think, if his act could

reasonably be accounted for by misapprehension of the meaning of the order; as for instance, where it did not specify clearly the prohibited place. Where the order specified "Wall Street," and the man was found in "Lower Wall Street," the prosecutor was held to have failed to prove his case.

I am afraid it is not quite unnecessary to say that a man absent without leave, and tried for that offence, should not be tried also for failure to attend the parades or perform the duties that would come within his obligations if he were present, these failures being but incidents of his absence.

## SECTION 16.

HEAD OF CHARGE.

Behaving in a scandalous manner unbecoming the character of an officer and a gentleman.

I append one or two instances of statements of particulars.

"In having at \_\_\_\_\_ on the  
given to Major A, \_\_\_\_\_ Regiment, the President of  
the Mess Committee, \_\_\_\_\_ Regiment, in payment  
of his mess bill a cheque for £ \_\_\_\_\_ on Messrs.  
which cheque was dishonoured on presentation,  
he, the prisoner, well knowing that there were not



funds to meet the said cheque, and not having reasonable grounds for believing that it would be met when presented."

"In having at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ when in command of \_\_\_\_\_ in the expedition against \_\_\_\_\_ then in rebellion against Her Majesty, and when carrying out an order to dislodge certain rebels from a cave, whence they had fired upon the Native Contingent, cruelly, wantonly and wrongfully caused \_\_\_\_\_ a captured rebel, to be shot to death, the said act not being done by him, the said \_\_\_\_\_ in good faith, for the purpose of suppressing the said rebellion or for the preservation of the peace at the said place."

As this is a charge of a very wide and vague character, a conviction upon which entails cashiering, a Court, before convicting, should be careful to see that the statement of particulars is so far proved as to disclose conduct which in both its effect and its motives fully and substantially fulfils the description of "Scandalous and unbecoming an officer and a gentleman"—in fact, reflects such discredit upon the service that the offender is unfit to remain connected with it.

SECTIONS 17 AND 18.

HEADS OF CHARGE.

- (a.) { When charged  
with } the care { of public } money { stealing } the same.  
{ When concerned in } the distribution { of regimental } goods { fraudulently misapplying or embezzling }
- (b.) { When charged with } the care { of public } being concerned { stealing } there-  
{ When concerned in } the distribution { of regimental } goods { in the conniving at the } fraudulent misapplication or embezzlement of.
- (c.) { When charged with } the care { of public } goods wilfully  
{ When concerned in } the distribution { of regimental } damaging the same.
- (4a.) { Stealing } money { the property of } a comrade.  
{ Embezzling } goods { belonging to a } an officer.  
public money. mess.  
public goods. band.  
institution.
- (4b.) Receiving, { stolen } { the property of } a comrade.  
knowing them to be embazzled { goods } belonging to a } an officer.  
mess.  
band.  
institution.
- (5a.) Such an offence of a fraudulent nature as is mentioned in sub-section 5 of section 18 of the Army Act, 1881.
- (5b.) Disgraceful conduct of { a cruel } kind.  
{ an indecent }  
{ an unnatural }

Sections 17 and 18 consist of a re-enactment of the ordinary Criminal Law as applied to public and regimental property, together with a virtual extension of that law so as to comprise any act of

a fraudulent nature, or of an indecent, or cruel, or unnatural kind. I think that the words "charged with" in Section 17, must be taken as meaning officially charged with, and must relate to goods placed under the prisoner's personal control in virtue of the public office that he fills. The section only makes it an offence to deal thus fraudulently with the goods, etc., actually so placed in the prisoner's charge, and does not apply to misappropriation of articles not thus entrusted. It is necessary to prove that the property belongs to a comrade if so stated; a charge for stealing from a civilian would not hold good under 4a or 4b of this section, although it would under Section 41 (5).

A sentry placed over a store or tent containing public property is not "charged" with the care of that property, within the meaning of this section.

The offences of embezzlement and stealing will be found dealt with in relation to Section 41 of the Act, and respecting Section 17 and Sub-sections 4 and 5 of Section 18, little else remains to be said. The exceedingly comprehensive scope of Section 18 (5 A and 5 B), as regards offences not before specified, renders legal technicalities almost valueless where the head of charge avers, the particulars

state, and the evidence proves, conduct which the common sense of the Court tells them is clearly in intention and effect disgraceful in the sense of being either fraudulent, cruel, indecent, or unnatural, as may be alleged.

Conduct not palpably "disgraceful," should not be thus tried. Thus, altering a pass for the purpose of over-staying leave or avoiding a punishment would hardly be held as "disgraceful."

A charge alleging fraudulent misapplication of public stores within a certain period during which the accused is in charge thereof, is a sufficient description of the offence, without a more particular specification of the time at which the defalcation took place.

Where a soldier is tried under these sections, and the circumstances make it doubtful whether the deficiency arose from wilful fraud on the one hand or neglect or mismanagement, I recommend an alternative charge of neglect under Section 40, so that it may be left to the Court to say under which of these categories the offence really falls.

#### SECTION 18.

##### HEADS OF CHARGE.

(1a.) Malingering.

(1b.) { Feigning } disease.  
      { Producing } infirmity.



ence to one of malingering, as being more simple and easily proved.

It has been decided that a man who from voluntary acts, as for instance, immorality or intemperate habits, involuntarily produces venereal disease or *delirium tremens*, or any other ailment, is not liable to trial under this section. The case of *delirium tremens*, however, might be met by a charge under Section 40. "Produces" disease must be taken as implying some act done with the deliberate intention of producing such disease. A charge of "having reported himself sick without sufficient cause, and thereby evaded his duty," was held to be bad in law, inasmuch as it contained no averment that the prisoner knowingly feigned disease. The fact of a man reporting himself sick without sufficient cause, may arise from a misapprehension of his condition by no means implying that deliberate misrepresentation on his part which is necessary to constitute a crime under this section.

#### SECTION 19.

##### HEAD OF CHARGE.

Drunkenness [on duty] or an aggravated offence of drunkenness.  
 In having at on the been drunk [when one of the  
 Barrack guard].



It is necessary to prove—

1. That the prisoner was drunk ;
2. (where the charge is for drunkenness on duty), that the prisoner was on the duty specified in the statement of particulars.

A soldier warned for duty, or being for duty in accordance with well understood custom, is on duty; and if when he should appear to perform that duty he is drunk, he is liable to trial for drunkenness on duty (aggravated drunkenness). But a man is not "on duty" within the meaning of this section who is found to be drunk when, in consequence of some exigency, he is placed on duty or warned for duty unexpectedly or out of the usual course.

A soldier forming one of a body of troops acting in aid of the Civil Power, is on duty continuously until his or their services are no longer required, even during hours when they may not be actively rendered.

So a man is on duty on the line of march at all times, whether actually marching or not, from the first place of departure to the ultimate destination.

Simple drunkenness on the part of a private soldier should be tried by Court Martial only when four similar offences have been committed within

the previous twelve months. But such a trial is legal.

There being under the Army Act virtually no difference between the offences of simple drunkenness, and drunkenness on duty, and the legality of a Court Martial for the trial of either, I would suggest as a rule, that the charge should be for drunkenness only, the fact that the prisoner was on duty, being admissible in evidence as a guide to the Court in awarding punishment.

Previous instances of drunkenness punished by Court Martial count against a prisoner in the same manner as those disposed of by summary award.

#### SECTION 20.

##### HEADS OF CHARGE.

- (1.) When in command of a  $\left\{ \begin{array}{l} \text{guard} \\ \text{picket} \\ \text{patrol} \\ \text{post} \end{array} \right\}$  [wilfully] releasing without proper authority a prisoner committed to his charge.
- (2.)  $\left\{ \begin{array}{l} \text{Wilfully} \\ \text{Without reasonable} \\ \text{excuse} \end{array} \right\}$  allowing to escape a prisoner  $\left\{ \begin{array}{l} \text{committed to his} \\ \text{charge.} \\ \text{whom it was his} \end{array} \right\}$  keep. duty to } guard.

When either of these offences is committed "wilfully," a sentence of penal servitude is incurred. To prove this more serious aspect of the case, it must be shown beyond reasonable doubt

that the accused in bad faith released the prisoner or allowed him to escape deliberately.

A charge under (1)—not alleging that the offence was committed “wilfully”—would be sustained against a person in command of the guard, even though he had acted merely through ignorance, misapprehension, or inadvertence, so long as it is shown that he had not “proper authority,” which may be taken to mean the authority having legal power to order the prisoner’s release. It must be proved that the prisoner was committed to “his charge,” *i.e.* that he was placed personally in his custody, or handed over to him personally by the person whom he relieved in the command.

The case likely to arise most frequently out of (2), in the absence of a wilful act, is that of an escort composed of a corporal and private ordered to convey a prisoner from one place to another. Upon proof (1) that the prisoner was duly received in custody by the escort, and (2) that he was not duly delivered up by them, a charge would lie against the corporal and a conviction would be legal, unless in the event of the corporal producing evidence to show that the prisoner escaped by some means against which he could not reasonably

provide; in fact, "without reasonable excuse." The prisoner is deemed to be "committed to the charge" of the corporal, and not of the private, and without some special proof to the effect that the private shared in the negligence (was for instance drunk), the private would not be *primâ facie* amenable to a charge under this section. If, however, there is evidence that the corporal, while necessarily absent for a time, gave over the prisoner handcuffed, and with all reasonable precaution, to the private he would be in the care of the latter, against whom a charge alleging that he was "committed to his care," or whom it was his duty to guard [or keep] would be sustainable in the event of the prisoner's escape, always of course in the absence of proof that the escape could not be reasonably provided against by the private in the circumstances.

Should the corporal and private be tried jointly, they are incompetent to give evidence for or against each other. If they are tried separately, each is, however, a competent witness upon the trial of the other.

A soldier being escorted to his corps from a gaol in which he has completed a term of imprisonment, is not a "prisoner."

## SECTION 21.

## HEADS OF CHARGE.

(1a.) Unnecessarily detain- { arrest } without bringing him  
ing a prisoner in { confinement } to trial.

(1b.) Unnecessarily failing to bring a prisoner's case before the proper authority for investigation.

(2.) After { an officer } failing { at the time } to the offi- into whose  
having a non- commiss- of the cer custody  
com- sioned officer { of the } to the non- the person  
mitted officer { or as soon } to the commis- was com-  
a per- a pro- reason- as practic- sioned account in  
son to a vost- able able with- officer writing,  
the marshal cause to in twenty- to the pro- signed by  
cus- an assist- four hours vest- marshal himself, of  
tody of ant pro- after such to the as- fence with  
{ vost- deliver } to the assistant- which the  
{ marshal } provost- marshal person so  
committed  
is charged.

(3.) When { as soon as } to give in { prisoner's name. } so far as  
in com- he was relieved writing to the prisoner's offence known to him.  
mand from (guard his duty to the officer name) of the officer by whom  
of a within twenty-four hours after whom he was ordered to report the written) officer the pri-  
guard a prisoner was committed to his charge. the account given him [per- son] soner was  
failing { } { } { } { } { } charged.  
by whom  
the pri-  
soner was  
com-  
mitted to his cus-  
tody.

In 1a and 1b, only the person who in the one case is responsible for the detention, and in the other whose duty it is to take steps to bring the case forward, is amenable to trial.

## SECTION 22.

## HEADS OF CHARGE.

- (1.) When in { arrest  
confinement  
prison  
[other lawful custody] } escaping.  
attempting to escape.

It is essential to show that the soldier was in lawful custody, as stated in the charge.

A soldier under escort from a gaol where he had completed a term of imprisonment to join his regiment is not in custody while *en route*.

An escape from custody may be either with or without force or artifice, or with or without the consent of the custodian. A prisoner finding the door open and walking out of the gaol, is guilty of an escape. But a soldier undergoing a sentence of imprisonment who goes away when working outside the confines of the prison, and not under the supervision of a warder or other lawful custodian, is not guilty of an offence under this section.

A prisoner escapes when he unlawfully goes out of sight or beyond the control of the person in whose custody he is placed.

## SECTION 23.

## HEADS OF CHARGE.

- (1.) Conniving at the exaction of an ex- { house } let to a sutler.  
orbitant price for a { stall }



- (2.) { Laying a duty upon Taking a fee in respect of Taking an advantage in respect of Being interested in } { the sale of provisions the sale of merchandise the sale of the purchase of } { brought into provisions stores } { a garrison a camp a station a barrack a [place] for the use of some of Her Majesty's forces. } { in which he has } { com-mand. autho-rity. }

I cannot call to mind a trial under this Section. It is only necessary to say that the charge must allege and the evidence prove the facts stated, and that the intention is an essential element of the offence.

## SECTION 24.

## HEADS OF CHARGE.

- (1.) { Making away with by Being concerned in making away with by } { pawning selling destruction [otherwise] } { his arms. his ammunition. his equipments. his instruments. his clothing. his regimental necessities. a horse of which he had charge. }
- (2.) Losing by neglect { his arms. his ammunition. his equipments. his instruments. his clothing. his regimental necessities. a horse of which he had charge. }
- (3.) Making away with by { pawning selling destruction [otherwise] } { a military decoration granted him. }

- (4.) Wilfully injuring {
- his arms.
  - his ammunition.
  - his equipments.
  - his instruments.
  - his clothing.
  - his regimental necessaries.
  - a horse of which he had charge.
- property be- {
- a comrade.
  - an officer.
  - a regimental mess.
  - a regimental band.
  - a regimental institution.
- longing to {
- public property.
- (5.) Ill-treating a horse used in the public service.

Formerly, when a soldier was discovered to be deficient in respect of articles of his kit, he was arraigned upon a charge of "having made away with, or lost by neglect." In 1869 this form of charge was pronounced illegal, from the fact that it described in the alternative two offences materially different. Since then, two alternative charges, one alleging "making away with," and the other "losing by neglect," the same articles have been to a great extent used, and quite unnecessarily in nearly every case. The offence of making away with, is a positive disposal of the articles by some deliberate and specific act, whether of selling, pawning, or otherwise placing them out of military reach. It is in the nature of a fraud. Losing by neglect is, on the other hand, a much more venial offence, both morally and legally, and is indeed only made

criminal for obvious military reasons. Hence a charge of "making away with" should be preferred only upon proof that the prisoner actually sold, pawned, or by some other positive act, disposed of his kit, etc. This proof, I need hardly say, is seldom or never forthcoming. The ordinary case is that of unexplained deficiency, usually accompanying illegal absence or some offence of the same description. Either the soldier left the articles behind him when absenting himself, and they were appropriated by others, or he got rid of them in some way not capable of proof during his absence. In either case the fact of the deficiency, together with the absence of a satisfactory explanation, justifies the inference that it was occasioned by neglect, and a charge of losing by neglect is therefore all that is necessary.

It is to be observed that "losing by neglect" is only triable in respect of the prisoner's own arms, equipments, etc. The Act says "his." This would, I think, include articles issued for his use, and entrusted to his care, as military clothing (hospital clothing, for instance), but not barrack furniture or the liveries or civilian clothing of an officer's servant. It would not include moneys or goods entrusted to

him for custody. A charge of losing by neglect money entrusted to a corporal for the management of a regimental entertainment was held to be bad. So was one with respect to the kit of a recruit which the prisoner was asked to take care of. So was a charge under the same head with respect to loss of stores from a tent over which the prisoner was sentry. So also a charge of losing by neglect property of which he had care, as mess waiter.

Losing by neglect a military decoration is no offence.

In the same manner a charge under (4) must allege, and the evidence must prove, that the injury was caused "wilfully." And injury caused accidentally, or even through culpable carelessness, is not an offence under this sub-section.

In passing sentences of stoppages under this section, a Court should be guided by Section 138, Army Act. They may award (Sub-section 3) stoppages to "make good such compensation for any expenses, loss, damage, or destruction occasioned by the commission of any offence;" but on the other hand the soldier is not to be subjected to stoppages for more than is sufficient to make good the loss, etc. Thus a noticeable distinction is drawn between the



- (2.) Knowingly, and with intent to { defraud { suppressing  
injure { making away } a document {  
some { with } which it { preserve.  
person { defacing } was his { produce.  
altering } duty to {
- (3.) Where it was his official duty to make a declaration respecting any matter, knowingly making a false declaration.

Under 1, it is necessary to prove (1) that the document is either one of those specified, or some other paper of the same kind having an official character; (2) that it was either made or signed by the accused, or that he was bound to acquaint himself fully with the contents; (3) that the statement was false, or fraudulent, or the omission with the object of defrauding as may be charged; and (4) that it was made directly by the accused or with his consent, and with the full intent of carrying out the deceit or fraud specified.

Under 2, it is an essential element of the offence that it must be committed with the deliberate intention of defrauding some person—it is not necessary to show whom.

Form 3 relates to those declarations which are customarily made by paymasters and others in a fiduciary position; also to declarations prescribed for officers on promotion or retirement, but it does not apply to statements in a summary of evidence,





or to ordinary reports, or verbal statements upon official matters.

## SECTION 26.

## HEADS OF CHARGE.

- |   |  |  |
|---|--|--|
| (1.) When signing a document relating to                    | <div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;">pay</div> <div style="display: inline-block; vertical-align: middle;">arms</div> <div style="display: inline-block; vertical-align: middle;">ammunition</div> <div style="display: inline-block; vertical-align: middle;">equipments</div> <div style="display: inline-block; vertical-align: middle;">clothing</div> <div style="display: inline-block; vertical-align: middle;">regimental</div> <div style="display: inline-block; vertical-align: middle;">necessaries</div> <div style="display: inline-block; vertical-align: middle;">provisions</div> <div style="display: inline-block; vertical-align: middle;">furniture</div> <div style="display: inline-block; vertical-align: middle;">bedding</div> <div style="display: inline-block; vertical-align: middle;">blankets</div> <div style="display: inline-block; vertical-align: middle;">sheets</div> <div style="display: inline-block; vertical-align: middle;">utensils</div> <div style="display: inline-block; vertical-align: middle;">forage</div> <div style="display: inline-block; vertical-align: middle;">stores</div> </div> <div style="display: inline-block; vertical-align: middle; font-size: 3em;">}</div> </div> | leaving in blank a material part for which his signature was a voucher.  |
| (2.) { Refusing to<br>By culpable<br>neglect<br>omitting to | <div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;">make { a report }</div> <div style="display: inline-block; vertical-align: middle;">send { a return }</div> </div>  | <div style="display: inline-block; vertical-align: middle;"> <div style="display: inline-block; vertical-align: middle;">which it was his { make.</div> <div style="display: inline-block; vertical-align: middle;">duty to { send.</div> </div> |

Under (1) it is to be understood that the document must relate to one or more of the subjects or articles specified in brackets, and that the omission must be a material one, *i.e.* such as might reasonably be expected to involve some wrong or injury.

Under (2) the neglect must be culpable—something more than mere forgetfulness or misapprehension.

## SECTION 27.

## HEADS OF CHARGE.

- (1.) Making a false accusation {an officer} knowing such accusation  
against {a soldier} to be false.
- (2.) In making a complaint { knowingly making a  
where he thought false statement af- } an officer.  
himself wronged fecting the charac- } a soldier.  
ter of }  
{ knowingly and wil- } material facts.  
fully suppressing } a material fact.  
desertion.
- (3.) Falsely stating {been guilty of} fraudulent enlistment.  
to his com- {desertion from the navy.  
manding {served in and} a portion of the regular forces.  
officer that {been dis-} a portion of the reserve forces.  
he had {charged from} a portion of the auxiliary forces.  
the navy.
- (4.) Making a wilfully false {military officer} in respect of the pro-  
statement to a {justice} longation of furlough.

Under (1) the accusation must mean some assertion made publicly or to another person, which, if true, would expose the person respecting whom it is made to punishment or to moral censure. It may be either verbal, or in writing. The accused must be proved to have known that it was false.

A statement made by a prisoner in his defence, *bonâ fide* for the purposes of procuring his acquittal or a lenient punishment, is not an offence, even though false.

It is not material to state the person to whom the accusation was made, provided it is shown that it was made for the purpose of becoming known.

It is to be noted that it is not an offence under this section for a soldier to make any complaint, even though it be false, frivolous, and vexatious, provided that he does not make a false statement affecting the character of an officer or soldier, or does not knowingly and wilfully suppress a material fact.

A soldier stating a falsehood to his superior does not commit an offence under this section; but there are circumstances which might make such an act triable under Section 40.

In a charge under (3) the statement must be made to the Commanding Officer, and not merely to a superior. But a written statement made to a superior for the purpose of having it placed before the Commanding Officer, would be a statement to the Commanding Officer within the meaning of the section.

#### SECTION 28.

##### HEADS OF CHARGE.

- |                  |  |   |
|------------------|--|---|
| (1.) When duly   | { summoned<br>ordered to attend }  | as a witness before a court-martial, making default in attending. |
| (2.) Refusing to | { take an oath legally required by a court-martial to be taken.<br>make a solemn declaration legally required by a court-martial to be made. |   |

- (3.) Refusing to produce a {power } legally required by a court-mar-  
document in his {control} tial to be produced by him.
- (4.) Refusing when a witness to answer a question to which a  
court-martial might legally require an answer.
- (5.) Being guilty of {using {insulting } language.  
contempt of {threatening}  
a court-mar- {causing {an interruption} in the proceedings  
tial by {a disturbance } of such court.

With respect to (4) a witness is not bound to answer a question the answer to which would tend to incriminate himself. By this is to be understood an admission which would render him liable to actual punishment, and not merely an admission which would subject him to moral censure or reprobation. If a witness has committed a serious crime, and a pardon from the Queen is handed to him, he is thereupon bound to answer any question in reference to that crime, no matter how shameful the disclosure may be, inasmuch as the pardon protects him from penal consequences.

I take it that any person attempting to influence the president or any member of a court in regard to the finding or sentence, privately or in any manner except by argument or evidence in open court, is guilty of contempt of court.

A person may be guilty of contempt of a Court Martial once the members are assembled, although they may not be actually sworn; for example, a

prisoner who, on being asked whether he objects to any member, makes an insulting reply not reasonably forming the ground of his objection.

A prisoner who, when being tried by Court Martial is guilty of contempt of Court, and whom it is not thought expedient to try for that contempt before another court, may be summarily awarded imprisonment with hard labour not exceeding twenty-one days by order under the hand of the president. This applies to an officer as well as a soldier. But such an order (I take it) must be read as a sentence, and therefore must commence (Section 68) on the date of the order. If the court awarded a sentence in respect of the offence under trial of twenty-one days or more, the two awards of imprisonment would be concurrent, and that for the contempt of court would be, therefore, inoperative. The following course would, however, meet the case in conformity with law. The court, after the president signs the order for the imprisonment for contempt, may adjourn until the date at which such imprisonment expires and then resume the trial; or if that course (having regard to the attendance of witnesses) be inconvenient, they may conclude the proceedings (except the sentence),

make the award for contempt, and then adjourn, reassembling for the purpose of considering their sentence for the offence under trial. In this way the prisoner would suffer both the imprisonment for contempt and that for the offence, provided that the aggregate period of imprisonment did not exceed two years, or, in the case of a regimental court, sixty-three days.

## SECTION 29.

## HEADS OF CHARGE.

- (1.) Wilfully giving } oath  
false evidence } solemn de-  
when exam- } claration } before { a court-martial.  
ined on } } { a court { authorized by  
 } } { an officer { the Army Act,  
 } } { } { 1881, to ad-  
 } } { } { minister an  
 } } { } { oath.

This section includes the crime of perjury, which may be defined as the assertion on oath (or affirmation) of some fact or condition of things material to the issue which the person making such assertion does not at the time believe to be true, or of which he is ignorant. The section has, however, a wider application, inasmuch as, when the false statement is made in any proceeding before a Court Martial, or a court of inquiry, or the Commanding Officer,



it is not necessary to show upon a charge framed in the words of the section that it is material to the issue. A charge, however, would hardly be justified if the matter of the statement were of a trivial or merely incidental nature.

To sustain a conviction it is necessary to prove—

1. That the occasion on which the evidence was given was a Court Martial, or other proceeding in which an oath (or affirmation) was administered to the prisoner as authorized by the Army Act. The production of the proceedings would be sufficient for this purpose.
2. That the prisoner swore as stated. This must be proved by the officer who recorded the evidence, or some other person who heard him so swear, the mere record of the evidence, unless thus verified, not being sufficient for this purpose.
3. That the evidence was false. One witness, unless corroborated in some material respect by another, is not sufficient for this purpose.
4. Some fact or circumstance reasonably showing that the false swearing was wilful, *i.e.* that

the prisoner did not believe, or was ignorant of, what he stated.

Even if the statement charged be literally true, yet if it is reasonably calculated to create, and is made for the purpose of creating, a belief which is false, it would be an offence within the meaning of the section.

#### SECTIONS 30 AND 31.

These sections contain very elaborate provisions regarding offences in connection with billeting and the impressment of carriages. They provide minutely for almost every contingency in respect of which an offence can be committed; and when a prosecution under either section is instituted, a very careful adherence to the words of the Act, both in the matter of the charge and the proof, would seem to be requisite. A detailed discussion of the many and different questions which may arise under them would be inconsistent with the objects of this work, bearing in mind that these sections are seldom resorted to. I have no recollection of any case arising under either of them.

## SECTION 32.

## HEADS OF CHARGE.

- |                              |   |   |   |   |   |                          |
|------------------------------|---|---|---|---|---|--------------------------|
| (1.) After<br>having<br>been | { | discharged with dis-<br>grace from a part<br>of Her Majesty's<br>forces<br>dismissed with dis-<br>grace from the navy | { | enlisting in the<br>regular forces<br>without de-<br>claring the<br>circumstances<br>of his | } | discharge.<br>dismissal. |
|------------------------------|---|---|---|---|---|--------------------------|

To justify a charge under this section it must be shown that the discharge was either (1) with ignominy, (2) as incorrigible and worthless, (3) on account of conviction for felony, (4) on account of a sentence of penal servitude, or (5) dismissal with disgrace from the navy. This may be proved either by the personal knowledge of a witness or by the prescribed documentary evidence, coupled with proof of the identity of the prisoner with the person named in the document.

The fact that the prisoner concealed the discharge, if not proved by the oral testimony of a person cognizant of the fact, may be presumed on the production of his attestation paper (in the original), showing that he had given an answer inconsistent with the disclosure of his discharge in the circumstances charged. The copy of the attestation paper would not (I think) be sufficient, as it only proves the fact of enlistment, and,

although it is probable, it cannot be assumed legally that a man known to be thus discharged would not be accepted as a recruit if he were otherwise eligible.

If the prisoner states in defence that either from his not having been given a discharge certificate, or for any other reason, he was ignorant of the cause of his discharge, the onus of proving the circumstances that might necessarily have occasioned such ignorance rests upon him. But if he can prove it he is entitled to an acquittal, as the guilty intention is of the essence of the offence.

It is to be particularly noted that men whose enlistment, accompanied with this kind of concealment, took place before the Army Act, 1881, came into operation are not triable under this section if the discharge was on account of conviction for felony or a sentence of penal servitude. And men are not triable under it at all, if the enlistment took place before the Army Discipline and Regulation Act of 1879 came into force.

A man who has thus enlisted in the Militia since September 27, 1881 is punishable by Court Martial for this offence, even though he is not at the time of the trial otherwise subject to military law.

## SECTION 33.

## HEAD OF CHARGE.

Making a wilfully false answer to a question set forth in the attestation paper which was put to him by or by direction of the justice before whom he appeared for the purpose of being attested.

The original attestation paper, but not the copy, is *prima facie* proof that the answer was given as recorded therein.

An officer duly authorized to attest is now a justice for the purposes of this section.

The falsehood of the answer may be proved either by (1) the oral evidence of a person cognizant of the facts, or by (2) the documentary evidence as prescribed by Section 163, Army Act, together with proof of the identity of the prisoner with the person named therein.

The wilful character of the falsehood is, of course, self-evident where the answer relates to previous service, marriage, or any fact in the history of the accused which it is not reasonable to suppose could have escaped his memory; but in the event of a charge being preferred where it relates to place of birth or age it should be specifically proved that

he must have been aware of the fact by reputation or otherwise.

With respect to the case of marriage, an extract from the parish register is legal evidence that a marriage was solemnized between the persons named therein; but it is necessary, in addition, to prove the identity of the prisoner with one of the persons so named. This cannot be legally proved by the wife, who is incompetent to depose in the matter.

A man who had not been attested would not be liable to trial for declaring that he had never "served."

A man who although attested had never been furnished with military clothing and had been discharged after a few days as not likely to make an efficient soldier would not necessarily be liable to conviction, as he might well be mistaken as to the fact of his having "served," and therefore might not have made a "wilfully" false statement.

A militiaman making a false answer upon enlistment in the Militia, although not otherwise subject to military law, is liable to trial by Court Martial. So is a Reserve man enlisting in the Militia.



## SECTION 34.

## HEADS OF CHARGE.

- (1.) Being concerned in the enlistment for service in the regular forces of a man when he {knew  
had reasonable  
cause to  
believe } such man to be so circumstanced that by enlisting he committed an offence against the Army Act, 1881.
- (2.) Wilfully contravening {the enactments of the Army Act, 1881  
other enactments  
the regulations of the service } in a matter relating to the {enlistment  
attestation } of soldiers of the regular forces.

This section was intended to meet the case of recruiters knowingly concerned in the enlistment of persons who by or in connection with such enlistment commit an offence. It clearly applies where the recruit is already in the service, for he commits the offence of fraudulent enlistment "by enlisting." But it does not expressly include the case of the civilian whose antecedents might render him objectionable as a recruit. For although probably he would not be accepted if these antecedents were known, and although he may therefore intend to give a false answer upon attestation, he does not as a fact commit an offence merely "by enlisting." But upon consideration it has been ruled that the section has a wider application; and where the recruiter knows of, or has

reasonable cause to believe any circumstance in the life of the civilian recruit, such as discharge with ignominy or previous service, and induces such recruit to give or connives at his giving a false answer upon attestation in respect of that circumstance, he is liable to a charge under this section.

## SECTION 35.

## HEADS OF CHARGE.

- (1.) Using { traitorous  
disloyal } words regarding the Sovereign.

I think the intention ought to be shown to sustain a charge under this section. A man uttering traitorous or disloyal words unconsciously or unmeaningly, while, for instance, in such a state of intoxication that he did not know what he was about, would scarcely fall within this section.

## SECTION 36.

## HEADS OF CHARGE.

- (1.) Without due authority { ver-  
bally  
in writing  
by signal  
[otherwise] } dis-  
closing { the num-  
bers of  
the posi-  
tion of  
some pre-  
parations  
for  
some orders  
(relating to) } { some forces  
some magazines  
of the forces  
some stores of  
the forces } { opera-  
tions  
move-  
ments } { of some  
forces } at such time  
and in such  
manner as  
to have pro-  
duced ef-  
fects injuri-  
ous to Her  
Majesty's  
service.

Charges under this section must be sustained by

evidence showing the existence of every fact recited in the head of charge. Thus there must be (1) an absence of due authority; (2) a disclosure or publication to some person outside the pale of authority; (3) the disclosure must relate to one or more of the matters recited in the section, and (4) both in (a) manner and (b) time it must have produced effects injurious to Her Majesty's service. It principally relates to persons under Military Law who are newspaper correspondents.

## SECTION 37.

## HEADS OF CHARGE.

- (1.) Being { an officer } striking } a soldier.  
           { a non-commissioned officer } ill-treating }  
 (2.) After receiv- } an officer } unlawfully detaining } the same  
       ing the pay of } a soldier } unlawfully refusing } when due.  
                           to pay }

A private soldier is not triable under (1), but if he commits the offence of striking another soldier he is liable under Section 40, or for an assault under Section 41 (5). The treatment, I take it, is confined to physical ill-treatment. Causing an offender to be carried face downwards without reasonable necessity would be ill-treatment. The word "soldier" in (1) includes a non-commissioned officer. Hence one non-commissioned officer striking another would be triable under this section.

## SECTION 38.

## HEADS OF CHARGE.

- (1.)  $\left\{ \begin{array}{l} \text{Fighting} \\ \text{Promoting} \\ \text{Being concerned in} \\ \text{Conniving at fighting} \end{array} \right\} \text{ a duel.}$
- (2.) Attempting to commit suicide.

The offences mentioned in this section do not require any particular remark. The word "conniving" may be taken as meaning, having a knowledge of and not disclosing the fact to a proper authority; in fact, acquiescing in. A fight otherwise than with deadly weapons is not a duel.

## SECTION 39.

## HEADS OF CHARGE.

- (1.) On application being made to him  $\left\{ \begin{array}{l} \text{neglecting} \\ \text{refusing} \end{array} \right\} \left\{ \begin{array}{l} \text{to deliver over} \\ \text{to the civil} \\ \text{magistrate} \\ \text{to assist in the} \\ \text{lawful apprehension of} \end{array} \right\} \left\{ \begin{array}{l} \text{an officer} \\ \text{a soldier} \end{array} \right\} \left\{ \begin{array}{l} \text{accused of an} \\ \text{offence pun-} \\ \text{ishable by a} \\ \text{civil court.} \end{array} \right\}$

The officer or soldier must be accused of an offence against the ordinary law, including any of those which may be punished by a Court of Summary Jurisdiction. The word "accused," I take it, is confined to an accusation which has so far assumed legal form that the Civil Power has deemed itself justified in taking steps for the apprehension of the person accused.

## SECTION 40.

## HEADS OF CHARGE.

- (1.)  $\left\{ \begin{array}{l} \text{An act} \\ \text{Conduct} \\ \text{Disorder} \\ \text{Neglect} \end{array} \right\}$  to the prejudice of good order and military discipline.

A charge framed under this section is bad in law unless the head of charge be in the words of the section. Thus a head of charge, "gross neglect of duty," and other similar descriptions are bad, as they fail to disclose an offence under any particular section of the Act. The statement of particulars must also disclose conduct, neglect, etc., which in the opinion of the court is distinctly "to the prejudice of good order and military discipline." The mere application of these words in a charge to certain conduct does not make it an offence, and as the words in the head of charge are of very comprehensive application, it especially behoves the members of a court carefully to consider whether the "conduct" is really and substantially to the prejudice of good order and of military discipline, and if they think it is not they are bound to acquit.

The place and circumstances in which an offence is committed are matter for consideration in this

respect. There are many kinds of conduct which, if committed in quarters, or while a soldier is present with his corps, would fall within this section, which would hardly be cognizable under it if committed on furlough, and beyond what may be called a military atmosphere, when in fact they are not prejudicial to good order and to military discipline.

I append the statement of particulars of some charges which would hold good under this section, the words, "in having," or "in that he," at being prefixed in each instance—

"Between the            and the            of            when liable to military duty indulged in excessive drinking of alcoholic stimulants, thereby inducing *delirium tremens*, and rendering himself incapable of performing such duty."

In this case it would be necessary to prove the excessive drinking, the subsequent incapacity for duty, and the fact that such incapacity was occasioned by the drinking. The mere fact of a soldier suffering from *delirium tremens* is not an offence.

"Been culpably negligent in keeping the accounts of the            Battery            Brigade Royal Artillery



under his command, and in the care of the money entrusted to his charge, in consequence of which neglect on the day of there was a deficiency of £ of such money for which he, the prisoner, could not account."

This charge (which was preferred as an alternative to one of fraudulent misapplication) resulted in a conviction, and sentence of dismissal, and stoppages to make good the deficiency.

"Been improperly in possession of the following articles of the kit of "

This section does not include offences of a non-military character. Where an officer made a promise that he would not again meet the wife of another officer, it was proposed to try him under this section for breaking that promise. It was held that the offence was rather social than military, and was not properly a matter for a military tribunal. It is a question, however, whether in aggravated circumstances, a transaction of this kind may not be triable under section 16, "scandalous conduct." So it has been held an unjustifiable straining of the law to try a soldier under this section for impertinent conduct to a civilian. When a charge under this section for borrowing money from a

civilian and refusing to refund was made, it was held that it was bad in law. So of one soldier borrowing money from a man of the same rank. But a non-commissioned officer borrowing money from private soldiers over whom he was placed, might (as I think) be held to have committed an offence under this section.

A misapprehension of his duty does not constitute an offence, and for the same purpose a neglect must be wilful or culpable, and not merely arising from an error of judgment.

So where the Court thought that certain expressions which of themselves would appear to disclose an offence under this section, were not said "meaningly, or with an intent to cast an imputation upon Captain       ," it was held to be in effect an acquittal.

## SECTION 41.

## HEADS OF CHARGE.

(1 4.)	<div> When on active service  In Gibraltar  In some place not in the United  Kingdom or Gibraltar and more  than one hundred miles as measured  in a straight line from any city or  town in which he can be tried by a  competent civil court for the offence </div>	<div> commit-  ing  the  offence  of </div>	<div> treason.  murder.  man-  slaughter.  treason-  felony.  rape. </div>
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- (5.) Committing a civil offence, that is to say [*state the offence according to English law either using legal terms, e.g., arson, larceny, larceny from the person, assault, robbery with violence, etc., or, in ordinary language, e.g., stealing, wilfully injuring property, setting fire to a house, etc.*].

It is to be noted that offences which are "particularly specified" in the previous sections of the act are not triable under sub-section 5, as for instance those specifically named in Sections 17 and 18, which may be said to comprise most fraudulent or disgraceful acts in relation to military persons or institutions. But attempts to commit these offences would be cognizable under 41 (5). So would the offences described in general terms but not specifically in Section 18 (5), when they do not come under the more precise description given in the previous sub-sections.

An offence of an officer which would come under the head of scandalous conduct as well as under the ordinary criminal law, would be triable under either Section 16 or Section 41. Also offences which may come under Section 40 and Section 41.

An offence committed by an officer or soldier against the person or property of a civilian is primarily triable by the ordinary criminal courts. Military law is subordinate to the general law; and if the aggrieved civilian elects to proceed against

the soldier before Justices, or by indictment, he is entitled to take that course. In many instances, however, it would be more to his interest to have the case disposed of by Court Martial, for in that event he would avoid the cost of a prosecution, and in the case of loss of property or wilful injury, would have a better prospect of being recouped by means of a sentence of stoppages than would be afforded by the operation of the ordinary law. But where the offence is dealt with by Court Martial the aggrieved person has no status beyond that of a witness. He cannot interfere with the conduct of the prosecution, and of course cannot interfere with the power of the Commanding Officer to exercise the discretion legally vested in him of dismissing the case if he thinks it ought not to be proceeded with, of punishing the offender summarily, or of sending him for trial by Court Martial. At the same time the Commanding Officer would naturally co-operate with the civilian to any legitimate extent which the interests of justice might seem to require.

I subjoin a general description of those civil offences which would ordinarily come to be dealt with by a Court Martial, together with remarks in

each case likely to enable the Court to appreciate those legal points and distinctions which are chiefly necessary to be borne in mind.

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### ACCESSORY.

A person who, without being present, aiding and abetting, directly or indirectly counsels, procures or commands another to commit a felony, which is actually committed, is punishable as an accessory before the fact. The instigation must be continuous in the sense of not being revoked before the commission of the offence, and it must be of an active character, and not consisting merely of a knowledge of the intention, and a passive acquiescence in the offence. When the crime instigated is committed in a different way, or where the crime, though different from that instigated, is yet a probable consequence of the instigation, the offence is established; but where the crime committed is different, and not a probable consequence of the instigation, the offence is not established.

A person who, knowing that felony has been committed, receives, harbours, or assists the offender with the intention of enabling him to elude the pursuit of justice, is punishable as an accessory after the fact.

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#### AIDING.

A person aiding or abetting, whether present or not, the actual commission of a felony or misdemeanour, is punishable; where a particular intention is part of the offence, the aider or abettor must be shown to have been aware of that intention on the part of the principal.

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#### ARSON.

Any person who maliciously sets fire to any place of Divine worship, to any dwelling-house, any person other than the offender being therein, or to any building (even in his own possession)



with intent to defraud or injure any person, or to any public or other building, or any crops or stacks of corn, hay, or vegetable produce, is punishable for this offence.

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### ASSAULT.

An assault may be defined as the application or attempted application of force or violence, directly or indirectly, to the person of another, without his or her lawful consent, with a hostile intention, not in self-defence, not in order to prevent a breach of the peace, and not under the authority of the law.

Lawful consent means any consent (1) not obtained by fraud or deception, (2) not given through ignorance or misapprehension of the nature of the act committed or attempted, or, (3) not for the purpose of a breach of the peace.

Consent would not divest the act of its criminality if in its nature it constituted a breach of the peace, that is to say, if it were committed for the purpose of inflicting bodily injury or loss of life.

The intention with which the transaction is entered upon appears to determine the question of the criminality. Thus a prize fight or a duel would be criminal, whereas a lawful game of sport, such as football, wrestling, boxing or single stick and the like, would not be criminal even if a serious injury resulted therefrom, provided the game was not carried on to the extent and for the purpose of inflicting such injury. What appears to make a fight illegal, as distinguished from sparring, is the intention to fight till one of the parties gives in from exhaustion or severe injury.

It is not essential to the establishment of an assault that actual injury should have been caused.

The following acts constitute offences under this head :—

A threatening gesture leading the person threatened to believe that force is thereby intended to be applied to him.

The act of depriving another of his liberty.

Striking a person who uses insulting language but who does not attempt violence.

Cutting clothing then being worn, although without an intention of touching the person of the wearer.

Encouraging a dog to bite, thereby rendering a person liable to be bitten.

Striking at, or throwing a missile at a person, although without hitting.

Striking a horse on which another person is mounted.

Throwing over a chair on which a person is sitting or about to sit so as to injure him.

Indecently touching a child of tender years, although he or she submits, and even consents through ignorance of the nature of the act.

Inducing a married woman to have sexual connection with the offender by pretending to be her husband.

Inducing a female to allow the offender to undress her by a false statement that it is necessary to do so for medical reasons.

Aiming a fire-arm at a person within range which the person aimed at believes (even though erroneously) to be loaded.

Any threatening action showing an intention coupled with a present ability to do personal violence.

Striking at one person and hitting another is an assault upon both.

Acts which, although in the nature of force are done for the purposes of the ordinary and reasonable intercourse of life with no greater force than the occasion requires, are not offences under this head. Thus the following are not offences :—

A person lays his hand upon the shoulder of another in order to direct his attention.

A man falling down catches hold of another to save himself.

A man involuntarily pushes against another in a crowd.

A man engaged in a lawful sport or game, in the ordinary course of the game hits another player or by misadventure hits a spectator.

A man strikes at another at such a distance that it is apparent to the latter that he cannot hit him.

Striking another for the purpose of self-defence against violence or attempted violence, and with no greater force than is reasonably necessary for that purpose.

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## ATTEMPT.

An attempt to commit a felony or misdemeanour is an offence punishable by the law of England under Section 41, Army Act.

An attempt to commit a crime is an act done with intent to commit that crime, which immediately and directly tends to its commission, and which if completed would be the crime itself.

Whether the non-completion of the act may arise from interruption, from some unexpected obstacle, or from the voluntary desistance of the person attempting, it is nevertheless an attempt, provided there is a possibility of its completion.

Soliciting or inducing or an endeavour to induce another person to commit a crime is an attempt to commit that crime. Mere intention, or an act manifesting that intention, is not an attempt.

It is to be noted that attempts to commit the various military offences specifically provided for in the Army Act are not offences, unless where, as in the case of attempting to desert, they are so declared, or where the crimes specified are also offences under the ordinary law of England.

## BIGAMY.

A man commits bigamy who, being legally married, goes through a form of marriage, which would in ordinary circumstances be recognized as binding, with another person during the life of his wife, such wife having been known to the accused to be living some time during the preceding seven years.

It is necessary to prove with regard to the first marriage that it was legally binding upon the parties, and with regard to the second, that such a form was gone through that, if gone through by persons competent to marry and without any incidental legal disability it would be recognized as binding, the intention of contracting a second marriage being the essence of the offence.

Where the parties have been separated continuously for seven years or upwards, it is necessary to prove that the prisoner knew the wife was alive at the time of the second marriage.

A person is an accessory to the crime of bigamy who goes through a form of marriage with another knowing that the latter thereby commits bigamy.



## BURGLARY.

Burglary is the breaking and entering the dwelling-house of another in the night time (between nine p.m. and six a.m.), with intent to commit a felony therein.

In former days there was much discussion as to what constituted "breaking and entering," with the general result that entry by violence, threat, artifice, or collusion with a person in the house, falls within this description of the crime of burglary. But it is not now necessary to enlarge upon this. The mere act of entering the dwelling-house of another at night with intent to commit a felony therein is a felony, without regard to the manner of entry (24 and 25 Vic. c. 96, s. 54). Without the breaking, however, the offence does not come under the head of burglary.

The place entered must be a dwelling-house at the time, *i.e.* the tenant, or some of his family or servants, must be there in its occupation for sleeping purposes. An unoccupied part of a house, which has internal communication with another part in which persons sleep, is a dwelling-house.

The entry includes the entrance into the house of any part of the offender's body, or of any instrument held in his hand for the purpose of intimidating any person in the house, or of removing any goods, but not the intrusion of any part of a housebreaking implement.

The intent with which the entry is made must relate to a felony, whether statutory or at common law, and if the entry is made for the purposes of a less offence, and a felony incidentally ensues, the full offence is not committed. Where this is doubtful, the offender should be tried for the felony proved to have been committed, rather than for the burglary or felonious entry which preceded it.

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### CARNAL KNOWLEDGE, RAPE, AND INDECENT ASSAULT.

A male person, over fourteen years of age, commits a rape who carnally knows a female without her voluntary and conscious permission.

Such person commits a felony who carnally

knows a girl under twelve years of age with her consent.

Such person commits a misdemeanour who carnally knows a girl above twelve and under thirteen years of age with her consent.

It is no defence that the accused was told and reasonably believed that the girl was above the age specified.

Carnal knowledge means the penetration to even the slightest extent of the female organ by the male organ of generation.

Where permission is obtained by artifice or fraud, or by reason of the woman not understanding the nature of the act, a rape has not been committed.

But voluntary and conscious permission does not include permission extorted by force or bodily fear; or,

Non-resistance through a state of sleep, unconsciousness, or insensibility at the time of the act; or,

Permission by an imbecile incapable of giving consent by defect of understanding.

But where a girl of weak intellect consented, apparently from sexual desire, it was held that it was not a rape.

Generally it may be held that where from the circumstances and conduct of the woman (above the age of thirteen), the man may reasonably believe that he is not committing a criminal offence, the act of sexual connexion does not amount to a rape.

To establish a charge of indecent assault (not amounting to an attempt at carnal knowledge) upon a female, it is necessary to prove the absence of consent voluntarily given. But in the case of a child of tender years who submits to indecent liberties without any active sign of dissent through ignorance of the nature of the act, this is not consent, and an indecent assault is committed.

An attempt to commit a rape means not merely an attempt to gratify sexual passion upon the person of the woman, but with the intention of doing so in spite of any resistance on her part.

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### CHEATING.

A person is punishable for cheating, who wins, for himself or for another, any sum of money or valuable thing by any fraud or unlawful device or

its practice which affects, or may affect, the public, in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of those that play, or in wagering on the event of any game, sport, pastime, or exercise.

Also, who obtains the property of another by any deceitful practice (not amounting to felony) which people, by ordinary care, cannot guard against.

But this does not include a mere imposition or deception which common prudence might guard against, or the mere telling of lies in reference to a private transaction.

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### COINING.

Any person is punishable who—

Utters counterfeit gold, silver, or copper current coin, knowing it to be counterfeit ;

Has in his possession three or more pieces of counterfeit gold, silver, or copper coin with intent to utter any of them ;

With intent to defraud, utters as current gold or silver coin any foreign or other coin which

is not current coin, or any piece of metal resembling in size, figure, and colour, the current coin as which it is uttered, and being of less value ;

Utters any counterfeit foreign coin, knowing it to be counterfeit ;

Has in his possession more than five pieces of counterfeit gold or silver foreign coin, without lawful authority or excuse (which the accused must prove).

Uttering includes offering, disposing of, circulating, putting off, or even producing for inspection with a fraudulent intent.

A person having coin in his possession includes knowingly and wilfully having it in the custody or possession of any other person on his behalf, or in any place for his use or benefit.

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### CONSPIRACY.

Two or more persons are guilty of conspiracy, and are punishable therefore, who agree—

To commit a crime even though no crime be committed, or



To do a lawful act by unlawful means ;  
To carry out a purpose which tends to pervert  
the administration of justice, or to disturb  
the public peace, or is injurious to the person,  
property, or character of any person, or to  
the public.

The law of conspiracy is characterized by great complexity and refinement, and an elaborate dissertation upon it would be quite out of place within the limits of this work.

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### COMPOUNDING OFFENCES.

A person taking back goods which have been stolen from him, or receiving amends in respect of such goods on condition that he will not prosecute, is punishable. In certain cases of offences which involve damages to an injured person, for which he can maintain an action, notwithstanding that they are also of a public nature, he may compromise or settle his private injuries in any way he may think fit. But an agreement for suppressing evidence, or stifling, or compounding a criminal prosecution, or

proceedings for a felony or misdemeanour of a public nature, is illegal and void, as impeding the due course of public justice.

An officer commanding a company who ascertains that his pay-sergeant has been fraudulently mis-applying the company's money, and who engages not to proceed against him on condition that he makes up the amount, commits this offence ; but he would not commit it if when he promised to do so he believed that the deficiency arose only from accident, or incapacity, or some cause not disclosing a criminal offence.

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#### EMBEZZLEMENT—*See* STEALING.

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#### EMBRACERY.

A person is guilty of this offence and is punishable, who, by any means except the production of evidence or argument in open Court, attempts to influence or instruct a juror to show favour to one side or the

other. Although I know of no precedent to that effect, I think a person attempting to influence any member of a Court Martial in the like manner, as to his vote upon a finding or sentence, would be guilty of this offence.

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### FALSE PRETENCES.

A person is punishable who obtains any money or valuable security by any false pretence.

The false pretence must be as to a pretended existing fact, and not a promise for the future. It must be a definite misstatement, and not mere exaggeration; and it must be the cause of the person defrauded parting with the money or article. It may be made orally, by writing, or by conduct, such as wearing the garb of a class of person to whom credit would probably be given, or giving a cheque on a bank where there was no account. Even where the person intends to pay when it is in his power the offence may be committed.

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FELONIOUSLY RECEIVING—*See* STEALING.

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FORGERY.

A person is guilty of forgery who with intent to defraud makes or alters or puts any signature to or knowingly utters any document by which another person may be defrauded.

Along with the making, altering, signing, or uttering as the case may be, it is necessary to prove (1) the intent and (2) the possibility, of defrauding or injuring in some material respect.

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## HOMICIDE.

Unlawfully killing a human being is either murder or manslaughter.

It is murder if it is done with malice aforethought, (which means an intention to cause, or a knowledge that the act will cause the death of, or grievous bodily harm to any person), or with an intention to commit a felony, or with an intent to oppose by

force an officer of justice in executing the duty of keeping prisoners lawfully in his custody, or keeping the peace, or dispersing an unlawful assembly, provided that the offender knows that the person killed is an officer and so employed.

It is manslaughter if the act causing death is done otherwise unlawfully, or is done in the heat of passion, when the offender is deprived of the power of self-control by provocation, which includes (1) an assault and battery of such a nature as to inflict actual bodily harm or great insult, (2) two persons quarrelling and fighting on equal terms, (3) an unlawful imprisonment of the offender, (4) the sight of adultery being committed with the offender's wife (as regards either wife or paramour), (5) the sight of the act of sodomy committed upon the offender's son, (6) an expression accompanied with some act showing an intention of then inflicting actual bodily injury. Words, gestures, injuries to property, breaches of contract, the use of lawful force, do not constitute provocation reducing the offence from murder. The provocation or circumstance reducing the crime from murder must be proved by the accused.

To justify a conviction for murder or manslaughter

the death must have taken place within a year and a day of the commission of the act causing it.

Killing by misadventure or by an act not unlawful, such as an accident which could not be provided against by reasonable precaution, is not unlawful homicide.

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### INDECENT EXPOSURE.

A person commits a misdemeanour who wilfully and indecently exposes his person or wilfully does any other grossly indecent act in any open and public place so that it is actually seen by more than one other person (it is doubtful if it is an offence if witnessed by one person only).

The inside of an omnibus in which there are other persons, the roof of a house, not visible from the street but visible from the windows of other houses, are included in public places. Indecent exposure committed while bathing close to a footway frequented by females, although the place has been usually used for bathing, is an offence.



## INJURIES TO PROPERTY.

A person wilfully or maliciously injuring any property, whether of a public or private nature, is punishable under the law of England. The act must be done purposely, not necessarily with reference to the particular property injured, but as distinguished from ignorantly, or accidentally, or from a fair and reasonable supposition on the part of the offender that he had a right to do the act, or from a mere trespass. Speaking generally an injury caused by any act done with an unlawful intent which might reasonably be expected to cause it would be an offence under this head. So would an injury caused by an act done so recklessly or wantonly that the injury would be a probable or natural result, although the consequence was more than the perpetrator intended. Malice or intention to do some unlawful act reasonably tending to the injury appears to constitute the offence. A man throwing a stone intending to hit another but unintentionally breaking a window would not commit it, nor would a drunken man lurching against and thereby breaking a window.

MANSLAUGHTER—*See* HOMICIDE.

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MISDEMEANOUR.

This name is applied to indictable offences of less gravity than felony. Most of those likely to come under the cognizance of a Court Martial are al-  
luded to under their specific designations. But there are some undefined misdemeanours which may be considered as offences punishable by the law of England. They relate to acts involving public mischief, or done by a public officer in relation to his official duty, or tending to pervert or obstruct the administration of justice or disturb the public peace.

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MISPRISION OF TREASON OR FELONY.

A person knowing that a treason or felony has been committed, not being a party thereto, who conceals the same, commits this offence.

MURDER—*See* HOMICIDE.

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PERJURY.

A person commits this offence who, when duly sworn (or upon affirmation) and examined as a witness upon a trial or proceeding, asserts some fact or condition of things material to the issue which he does not at the time believe to be true, or of which he is ignorant.

A statement which, though literally true, is made for the purpose of creating a false impression is perjury.

The statement must be wilfully false. Hence the assertion of an opinion would hardly be the subject of a charge under this head. A man stating that a person was sober, when in fact he was drunk, could only be subjected to this charge when the drunkenness was so palpable to him that his assertion was something more than a mere matter of opinion.

In a prosecution for perjury before a Court Martial (as distinguished from a charge of false swear-

ing under Section 29), the prosecutor should produce the proceedings of the Court Martial before which the alleged perjury took place, to enable the Court to see whether the statements were in fact material to the issue (relevant). These proceedings, however, would not be proof that the accused swore as recorded. A member of the Court, or some other person who was present, must prove that the prisoner swore as stated in the charge; and more than one witness must prove either directly or by some corroborative evidence the falsehood of the matter sworn.

#### RAPE—*See* CARNAL KNOWLEDGE.

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#### RESCUE.

A person commits this offence who, forcibly and against the will of the custodian, releases another from the lawful custody of a person authorized to have him in custody, and whom he knows or has reason to believe is so authorized.

## RIOT.

This offence consists in the assembly of three or more persons for the purpose of committing a crime or of carrying out some purpose (although lawful) in a manner to cause reasonable apprehension of a breach of the peace, and the commencement of the execution of their purpose by a breach of the peace and to the terror of the public.

Persons originally assembled for a lawful purpose are guilty of riot if they proceed to execute an unlawful purpose to the public terror.

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## ROBBERY.

Robbery means the taking property from the person or immediate presence of another by actual violence used to overcome or prevent resistance or by threats to his person, property, or reputation.

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## SODOMY.

This felony is committed by any person who, being a male over the age of 14, carnally knows any animal or, carnally knows any male or permits himself to be so carnally known. It is necessary to prove penetration to establish the complete offence. A person permitting an attempt to commit this crime upon him is punishable as well as the person attempting. There is a decision of the majority of the judges that the offence may be committed upon a female.

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STEALING, EMBEZZLING, FELONIOUSLY  
RECEIVING.

A person steals who (a) without lawful permission takes any property which does not belong to him and to which he does not believe he has a claim, he then intending to deprive the lawful owner of his property therein, or (b) takes an article not belonging to him in such a manner as to constitute a trespass (a deprivation of the owner or custodian without



his permission of its possession temporarily) and subsequently does any act with the intention of depriving the owner of his property therein. But an innocent taking, such as a finding not knowing who the owner is, although followed by a wrongful conversion when the finder becomes aware of the ownership, is not stealing, and is only the subject of a civil action. To constitute stealing it is enough if the taking be through fraud or artifice or the wilful taking advantage of a mistake so long as there is at the time of the taking an intention of permanently depriving the owner of his property in the article.

It is generally speaking immaterial in whose possession the property may be at the time of the taking. But if the offender has it in his possession as the clerk or servant of the owner the offence is called embezzlement. If he has it in his possession as a bailee or person to whom it is temporarily entrusted, its conversion is stealing.

A man steals if he converts to his own or another person's permanent use or benefit the property of a corporation (or mess) of which he is a member, although the article is one of which, as a member of the society, he is entitled to the use for a special

limited purpose and in which he thus has a qualified property.

It is necessary to prove that the property alleged to be stolen passed out of the possession of the custodian or owner without his consent.

The return of the money stolen or fraudulently misapplied does not exempt the prisoner from the consequences of his offence.

The following kinds of property appear not to be capable of being stolen.

The soil of the earth, running or standing water not stored in pipes or reservoirs, wild animals kept in a state of captivity otherwise than for profit, animals of a base nature not kept for any domestic purpose, live wild animals in the enjoyment of their natural liberty, human dead bodies, things of which the ownership has been abandoned, things of no value.

To sustain a charge of feloniously receiving it is necessary to prove some circumstance showing beyond reasonable doubt that the accused knew that the article was stolen or embezzled or otherwise feloniously taken.

A charge of unlawful possession which does not allege that the prisoner knew the articles to be

stolen or that he had them with a felonious or fraudulent purpose is bad in law. Mere "unlawful possession," although punishable under certain local Acts, is not a crime punishable under the Law of England within the meaning of Section 41 (5). This, however, does not affect the validity of a charge under Section 40, of a soldier being in improper (in a military sense) possession of the kit of another soldier.

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### TREASON.

High Treason is committed by a person who either does, or conspires to do, or by any overt act or printing or writing shows an intention of doing, any of the following acts—

- (a) Killing, or injuring in a manner tending to kill, or maim, wound, imprison, or restrain the Sovereign.
- (b) Killing the wife of the Sovereign, or the Heir Apparent.
- (c) Deposing the Sovereign from the exercise of her authority in any part of her dominions.

- (d) Levying war against the Sovereign, either in the shape of an attack upon or resistance to her forces by the ordinary means of warfare, or an insurrection of any kind with the object of compelling the Sovereign or either House of Parliament by force or constraint to do, or abstain from doing, any act relating to their measures or policy.

Treason is also committed by any person who instigates a foreign power or person to invade the Sovereign's dominions, or who assists an enemy at war with the Sovereign, or who attempts by an insurrection, to effect any public object.

Treason-felony or sedition consists in the forming and expressing by any overt act, or by publishing any printing or writing, an intention to do any of the acts of treason above-mentioned, or attempting to vilify or degrade the Sovereign in the esteem of her subjects, or to create discontent and disaffection, tumult, violence or disorder, or to bring the Government or constitution into hatred or contempt, or to effect any change in the laws by the recommendation of physical force.

## THREATENING LETTERS.

It is a punishable offence for any person to send or to be concerned in the sending or delivery, knowing the contents thereof, of any letter (1) threatening to murder any person, or (2) demanding property, without a reasonable claim thereto with menaces, or demanding property with menaces with intent to steal, or (3) threatening to accuse of any crime punishable with death or seven years' penal servitude, or rape or attempt thereto, or an unnatural crime, with intent to extort money, or (4) accusing of such crimes with intent to extort, or (5) threatening to burn or injure property. The threat must be of a nature to cause a reasonable man some alarm or bodily fear calculated to influence his actions so as to affect their free and voluntary character.

It is immaterial by whom the threat is to be carried out, whether by the offender or another person. Where an accusation or threat of accusation is made it is immaterial whether the matter is true or false. No evidence will be admitted for the purpose of establishing its truth, although evidence of this tendency may be given for the purpose of discrediting the person threatened, as a witness.

## POWERS OF COMMANDING OFFICER.

## SECTION 46.

The Commanding Officer is given by this section absolutely and without qualification the legal power of disposing of any offence, however grave, by dismissing the charge if, in his discretion, he thinks it ought not to be proceeded with.

Where the accused is a soldier he may punish any offence summarily within the legal limits of punishment conferred upon him; but by the Queen's Regulations (Sec. vi. 35) his power of summary punishment and of remanding for a Regimental Court Martial is directed to be exercised only in the case of certain offences. In all others he should refer to superior authority. But this regulation does not affect his legal jurisdiction. Hence where, through forgetfulness or misapprehension of the effect of this restriction, but with a full knowledge of the facts, he punishes summarily an offence which he is thus enjoined to refer to superior authority, his act (although a neglect of regulation for which he is personally responsible) has the legal effect of relieving the soldier from any subsequent liability



in respect of the offence so dealt with. Thus, if through an error of this kind he awards a summary punishment for striking a superior, that award on being completed renders the man dealt with no longer liable to trial by Court Martial for the act so punished. So, if he awards a punishment, and afterwards finds out that it is for some reason (possibly from being concurrent with a previous award) inoperative, he cannot send the case for trial by Court Martial.

If, on the other hand, the Commanding Officer disposes summarily of a case through a misapprehension not of the restrictions upon his jurisdiction prescribed by the Queen's Regulations, but of the facts of the case ; if, for example, the circumstances assume a graver aspect than that in which they were presented to him when he made his summary award, that award is not a bar to such future proceedings in the shape of trial as the new evidence may render advisable. In the case of a soldier charged with assaulting another, if the assault appeared not to be of such a serious character as to render more than a summary punishment necessary, and it afterwards proved to be so serious as to cause death, the fact of a summary punishment having been

inflicted would not exempt the accused from trial for murder or manslaughter, as the case might be. So if a soldier were summarily punished for a few days' absence, no other fact then appearing against him, he would not be exempt from a trial for attempting to desert if it turned out that during his absence he had committed that offence.

A soldier convicted or acquitted of an offence by Court Martial or by the Civil Power is not liable to be dealt with by his Commanding Officer for that offence.

But the fact of magistrates having refused to deal with an offence is no bar to the trial of the offender (being a soldier) by Court Martial, or to his being summarily punished by his Commanding Officer for that offence.

A summary award is deemed to be completed when the prisoner is marched outside the orderly-room, and it cannot then be recalled for the purpose of increasing the punishment or substituting a remand to a Court Martial—unless in the case mentioned above, of misapprehension of the facts.

But the Commanding Officer can always mitigate or remit the summary punishment.

If a soldier claims a District Court Martial, under

Section 46 (8) he cannot be tried by a Regimental Court. But in the absence of an appeal to a District Court specifically, the Commanding Officer may remand him for trial by any description of Court to which he might have originally sent him for trial instead of making a summary award.

Under Sub-section 1 (c) Section 140 (d) and Article 766 of the Royal Warrant of 1882, a Commanding Officer has the discretionary power of awarding stoppages to a soldier absent without leave for five days or under. The award, however, must not exceed the loss of a day's pay for each day of absence, as defined by Royal Warrant. This definition comprises (1) any day where by reason of such absence the soldier fails to perform a duty which is thereby thrown upon another person, and (2) when the absence amounts to six hours continuously, whether wholly in one day (midnight to midnight), or partly in one day and partly in another. The extent to which stoppages under (2) can be made is not very clearly expressed in the Warrant. It, however, amounts to this. For an absence exceeding six and not more than twelve hours, one day's pay may be stopped. When the absence exceeds twelve hours then the pay may be

stopped for any day (midnight to midnight) during any portion of which the offender is absent. Thus in the case of absence as follows :—

From tattoo (10 p.m.) on the 1st

To 3.59 a.m. on the 2nd, no deduction.

To any time from 4 to 9.59 a.m. on the 2nd,  
one day.

To any time between 10 a.m. to midnight on the  
2nd, two days.

To any time on the 3rd, three days.

Thus a man is liable to stoppages of three days pay for absence, say from 11.55 p.m. on the 1st to 12.5 a.m. on the 3rd. I have reason to doubt, however, that this was intended by the framers of the Warrant; and a Commanding Officer would naturally be slow to avail himself of the power thus given him as a maximum.

With respect to (1) where a duty is missed, I have often been questioned by Commanding Officers as to the legality of making a man pay up a duty, missed through his own fault and thus thrown upon a possibly well-behaved soldier. My answer has been, that there exists no power to do this as a punishment. But, on the other hand, it is open to any Commanding Officer to arrange the roster

for duty so that duties shall fall, so far as may be, in equal proportions upon the men. I do not see why this power should not be exercised for the relief of well-conducted men, by making offenders pay up the duties they have missed by voluntary absence. I do not think, however, that this theory could be properly extended to duties missed through involuntary absence, such as detention in prison.

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## QUALIFICATION OF MEMBERS OF COURTS MARTIAL.

### SECTION 48.

With reference to the period of service qualifying officers to sit upon Courts Martial, time passed in the Militia counts equally with that in the Regulars towards the time qualifying. An officer is qualified who, upon the date of the assembly of the Court, has completed the prescribed number of years continuously in either Regulars or Militia, or partly in one and partly in the other. The conditions laid down in this section must be carefully attended to.

Thus where the convening officer of a District Court Martial told the officer commanding a Regimental District to detail an officer as President it was held not to be a legal appointment, and the proceedings were void.

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### OFFICERS INELIGIBLE AS MEMBERS.

#### SECTION 50.

The Commanding Officer of the prisoner, and the officer who judicially investigated the case, are rendered ineligible under Sub-section 3. The former includes the actual Commanding Officer, even though on leave at the time the offence is inquired into, and the officer administering the command at that time. The Commanding Officer may be defined generally as the officer who deals with the prisoners in the orderly room. The officer who investigated the charges means the officer who in a judicial capacity sifted the evidence in such a way as to acquaint him with, and to lead him to form a conclusion upon, the merits of the case, and would not include an officer through whose hands the charges passed merely formally or ministerially.



There is a reason beyond those specified in this section which would disqualify an officer from sitting upon a Court Martial. It rests upon the well-known principle of law, that a man cannot be judge in his own cause. An officer who has a personal interest in the case is legally incapable of exercising judicial functions. The slightest material or personal interest constitutes this disqualification. Thus, the conviction of a man charged with stealing the property of the officers' mess of a certain regiment would be bad if even one officer of that regiment sat upon the Court. So, when a man was charged with libelling the officers of a regiment, the conviction was declared illegal, from the fact that one of these officers sat. So an officer whom the prisoner is charged with striking, or threatening, or defrauding, is ineligible. In a case, however, where the prisoner pleaded guilty, the finding was not disturbed, because in that case the Court had virtually no option, and its office became ministerial rather than judicial. But the sentence was pronounced invalid, that being a matter within the judicial powers of the Court. It is to be noted that the presence on the Court of one officer thus personally interested is sufficient to invalidate the

finding or sentence as the case may be; for it is impossible to say that the single vote of that officer may not have been the cause of the decision of the Court.

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## CHALLENGES.

### SECTION 51.

In determining the question whether a prisoner's objection to a particular officer as a member of the Court should be allowed or overruled, the main principle to be borne in mind is, that every person exercising judicial functions should do so entirely free from prejudice. If it appears that an officer has expressed or entertains an opinion upon the merits of the case, or adverse to the prisoner personally, or if his relations with the prisoner have been such that he might regard him as an obnoxious person, I venture to think an objection on that ground should be allowed. It would be no imputation upon the good faith of the officer objected to; it would not imply an opinion on the part of the officers dealing with the objection that he would

not honestly endeavour to fulfil the obligations of his oath. It simply means an opinion that the case should, as far as possible, not be judged by minds upon which a prejudice may rest even insensibly, and that in every practicable way respect should be shown, not only for the direct interests of justice, but for the reputation of justice.

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## FINDINGS.

### SECTIONS 53 AND 56.

A finding of a Court is to be understood as "guilty," or "not guilty," as the case may be, according to law.

Cases have occurred in which certain members of a Court, believing the facts alleged in the statement of particulars to be proved, have felt conscientiously bound to come to a finding of guilty, under the impression that the issue before them is simply whether the prisoner committed the acts stated. This is an error. To justify a conviction, a Court must believe

two things, (1) that the facts alleged are proved, and (2) that these facts constitute the offence declared in the head of charge. Where the second point is not established in their minds, they should acquit simply. But the following form of acquittal is open to no objection (say under Section 40):—

“The Court find that the prisoner committed the act stated in the charge, but that the same is not conduct to the prejudice of good order and military discipline, of which they therefore acquit him.”

When a Court comes to a special finding of guilty upon alternative charges, under Rule of Procedure 43 (F), they must be of opinion that the facts proved amount to an offence under one or the other (although they cannot say which) of the alternative charges, in order to justify a conviction.

Where a Court found as a fact that the prisoner was in unlawful possession of a towel, adding, “the Court doubt whether such fact constitutes in law the offence stated in the said charges, and therefore they find him guilty of the offence in such one of these charges as the facts in law constitute,” it was held to be an acquittal. The form given on page

255, Rules of Procedure, would seem to require amendment, and I recommend a Court coming to a finding in such circumstances, to do so in the following form :—

“The Court find that the prisoner did (here state the facts), and that the same constitutes an offence under one of the charges, but the Court doubt which, and therefore they find the prisoner guilty of the offence on such one of those charges as the facts in law justify.”

Upon such a finding, the confirming officer has to say which of the alternative charges is established by the evidence, and to confirm upon that charge only.

By Section 56 (Sub-sections 1 and 2), a Court may find a prisoner charged with stealing guilty of embezzlement, or fraudulently misapplying, and one charged with embezzlement, guilty of stealing or fraudulently misapplying, these offences being substantially similar. But the finding must relate to the articles stated in the charge to have been so stolen or embezzled. In the same manner a man charged with desertion may be found guilty of absence without leave, or attempting to desert;

also a man charged with attempting to desert may be found guilty of desertion or absence without leave, as the evidence may prove to the satisfaction of the Court. Similarly, in trials for offences against the ordinary law, a Court may, as a rule, find a prisoner guilty of an attempt if the full offence be not proved. But with regard to the military offences specified in the Act no such power exists. For instance, a man charged with striking or threatening a superior, or disobeying a lawful command, cannot be found guilty of an offence under Section 40 (conduct to the prejudice, etc.), although the evidence may properly reduce the prisoner's guilt to the minor degree implied in that section.

Sub-section 56 (5) has been erroneously interpreted as conferring this power. In effect that sub-section is intended only to empower a Court, when an offence is charged as having been committed on active service, or in other circumstances thereby involving a higher punishment, to find that it has been committed not on active service, or in those circumstances as the case may be. It appears to me that this is an unnecessary provision, as it is always open to a Court to find a man guilty of a



charge with the exception of certain words (they would be in this case "on active service") and so long as what remains discloses an offence, it is a good conviction to that extent.

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### PREVIOUS CONVICTIONS.

Convictions for offences committed by a soldier at any time while serving as a soldier, whether in his present or in another corps, or while in a state of desertion or illegal absence, may be given in evidence after a finding of guilty. So may a conviction by the Civil Power, during a soldier's service, even for an offence committed while he was a civilian.

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### SENTENCES.

The limits of punishment for the different offences specified in the Army Act are prescribed in each section, and upon this subject it will only be necessary to remark briefly.

The sentence should be that which the Court think necessary in the interests of discipline, and having regard to the nature and degree of the offence, and the antecedents of the prisoner as deposed to in evidence. All these matters are entirely for the cognizance of the Court, which should not be guided in the matter by the influence or opinion of any other person, however highly placed. They should not pass a sentence more severe than the above considerations may seem to them to warrant, because they form a General or District Court, or because they may surmise that the Commanding Officer, by resorting to a Court of larger power in the matter of punishment, desires an award beyond the power of an inferior Court. They should not contemplate the contingency of the confirming officer remitting the sentence so as to bring it down to what they consider just and expedient. Unless when the Court (as where cashiering is peremptorily prescribed) have no option given them, a recommendation to mercy shows a misapprehension of their own functions, which are not to recommend, but to authorize the infliction of a just sentence only. If a General Court Martial consider that a prisoner's offence may be properly

punished by one day's imprisonment, they should pass that sentence and no more.

Where a confirming officer reproved a District Court Martial for passing a sentence on the ground that it but slightly exceeded what a Commanding Officer could pass, he was informed that his reproof was based upon a serious misapprehension of the proper functions of a Court Martial. A soldier should not be punished for exercising his legal right of electing to be tried by Court Martial in lieu of submitting to the Commanding Officer's award. This being so, I have always doubted the propriety of a District Court Martial (apparently only because it had the power) passing a sentence of fifty-six or eighty-four days' imprisonment for an offence which the Commanding Officer thought might be adequately met by a punishment within his jurisdiction.

Power is given to a Court to impose a sentence of stoppages, not as a punishment of the prisoner, but as a means of recouping the public or the individual suffering a loss by the offence, and these sentences should be carried out only to the extent of "making good" that loss substantially. Thus a man losing, by neglect, a glove, might be sentenced

to stoppages to make good a pair of gloves. If he subsequently produced the missing glove, he would have "made good" the award. If he could not produce it, the sentence would properly subject him to stoppages to provide a pair of gloves for the purpose of replacing the pair rendered practically useless by his offence.

So when a soldier has lost, by neglect, a tunic part worn, to say, within a month of the time at which it would have done its allotted work according to regulations, the Court may sentence him to stoppages until he shall have made good a tunic. But if he can be supplied with, or can obtain, a tunic similarly part worn as the lost one, and equally suitable for his military purposes, he has fulfilled the sentence.

But it is to be noted that now sentences of stoppages for lost articles of kit (*i.e.* those articles which the man has to keep up at his own expense, and which are properly only a matter of account between his captain and himself) are practically unnecessary.

Sentences of stoppages should not be passed to make good daily pay received by a man while fraudulently serving, or loss occasioned to the

public by the ordinary expenses of a prosecution, or the expenses of an escort, or losses caused indirectly by the offence, such as the necessity of sending another person on the prisoner's duty. But where a prisoner under escort, being physically able, refused to walk a reasonable distance, and it was consequently necessary to hire a conveyance, the cost thereof was properly made the subject of stoppages, not as a part of the expense of the prosecution, but as a loss caused by the prisoner's offence of resisting the escort.

When a sentence of stoppages to a large amount was passed for loss occasioned to the sergeants' mess by the defalcation of the prisoner, and it was shown that the loss was, in a great measure, due to the negligence and want of supervision of other members of the mess, it was considered advisable that the stoppages should be remitted beyond the sum which the prisoner might have made away with if that supervision and check prescribed by regulations had been exercised with proper and reasonable care.

So I venture to think where an officer commanding a troop, battery, or company gives to his pay-sergeant, or other subordinate, an unnecessarily

large sum of money, and where a default occurs, the stoppages ought equitably to be limited to such a sum as the man might properly have been entrusted with, if the officer did his duty in exercising due personal supervision of the finances of the troop or company. In such a case the officer not only commits an offence against the law for which he is liable to trial under Section 40, but he is guilty of the moral offence of subjecting his subordinate to undue temptation, having regard to his pay and position. Still more ought this principle be kept in view in instances where the pay sergeant, to save himself trouble, entrusts a comparatively large sum of money to a corporal or private. In the former case, the superior neglects his proper duty by delegating it to an inferior; and in the latter, the inferior still further improperly shifts this delegated duty to an agent who is officially irresponsible in this respect, although, of course, liable to a criminal charge.

Although it is right that, for the information of the Court, acting rank should be mentioned in the charge: "Corporal" (Lance-sergeant), or "Private" (Lance-corporal), a Court ought not to deal with that rank in its sentence. They should not pass a sen-



tence of reduction to or from that position, which is not legally a rank. Thus, a sentence of reduction from Lance-sergeant to Corporal, or Lance-corporal to Private, or from Sergeant to Lance-sergeant, or to Lance-corporal is a nullity. But a sentence of imprisonment upon a Lance-corporal would of itself involve his reduction to the ranks.

Where several men are convicted of the wilful destruction collectively of Government property to a certain amount, each may be sentenced to stoppages to the full amount of the loss occasioned, but in carrying out the sentence the loss should be divided and apportioned equally among those upon whom stoppages can be levied.

A sentence of imprisonment, "to commence at the expiration of," or "in addition to," one that a prisoner is undergoing at the time of his trial, is inoperative to the extent implied by these words. So much of the sentence may be regarded as superfluous, and not affecting the award as it would stand if they were expunged. The prisoner is liable only to the number of days imprisonment specified in the sentence, counting from the date of the original signature of the proceedings.

Thus when a man was sentenced to be reduced

to the ranks, and it turned out that the sentence was a nullity, the prisoner not being in fact a non-commissioned officer at the time of the trial, and when upon reassembly the Court passed a sentence of imprisonment, it was held that the imprisonment must be deemed to commence as from the day on which the original, although erroneous, sentence of reduction was signed.

A sentence of imprisonment passed in months without the word "calendar" must be deemed to mean lunar months.

Where an increased sentence is passed upon revision, the whole sentence, both original and revised, is bad; for the original sentence is revoked by the Court on revision, and the Court has no power to pass the increased sentence. It is not legal for the confirming authority to send back a sentence even for an award of stoppages, which, in the first instance, was inadvertently omitted. But if the original sentence was wholly and in every respect illegal, a nullity in short, the Court may be reassembled for passing a legal sentence; for the first being a nullity cannot be "increased." Thus, if a District Court Martial, upon charges of striking a superior and drunkenness, exceeded their power

by passing a sentence of penal servitude, that sentence would be a nullity, and the confirming authority might reassemble the Court for the purpose of passing a less sentence within their powers. But if the Court awarded a fine of £1 along with the penal servitude, they could not be reassembled in order to pass a new sentence of imprisonment, for so much of the original sentence as awarded a fine was in conformity with law, and could not be increased. In such a case, the confirming officer would have no course open to him but to withhold confirmation to the award of penal servitude, leaving the finding and the sentence of fine to stand.

When a finding is varied upon revision, it is absolutely necessary that a fresh sentence should be passed, and it is not sufficient for the Court to adhere to their former sentence; for the revocation of the original finding destroys the sentence which was based upon it, and if no new sentence be passed, the prisoner is not legally under any sentence.

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## CONFIRMATION AND REMISSION.

## SECTIONS 54 AND 57.

Confirmation cannot legally be given where the Court is constituted or where the proceedings have been conducted in contravention of the provisions of the Army Act, or where the charge discloses two offences in the alternative, or where it discloses no offence (even where the plea is guilty) or is bad from vagueness, or where the prisoner has been convicted upon illegal evidence, or has been unduly restricted in his defence, or where, by a letter of recommendation to mercy, a Court appears to have convicted in error, or where a plea of guilty has been improperly recorded through a neglect of Rule 36 (A). But a deviation from the Rules of Procedure would not, under Rule 55 (B), necessitate a refusal to confirm so long as the Court has jurisdiction, has convicted the prisoner of the charge upon legal evidence, and it does not appear that an injustice has been done by the deviation.

Where confirmation is withheld from one of several charges, due consideration should be given

to that fact by the confirming officer in the way of remission, inasmuch as it is reasonable to suppose that some part of the sentence awarded was apportioned to the charge which falls to the ground through non-confirmation. It would be legally necessary for him to do so where any item of the sentence was based upon this charge, such as stoppages for loss of kit.

The confirming authority may confirm a finding in a charge with the exception of certain words, or he may vary the finding in certain cases as prescribed by the Rules of Procedure.

The confirming authority, when confirming, may mitigate, remit, or commute the punishment to any sentence which the Court might have passed. This appears to me not to empower a confirming authority to commute a sentence (say of cashiering under Section 16) which it is imperative upon the Court to pass. In such a case where a less penalty is deemed to be sufficient, it can only be done by the Crown and in the form of granting a pardon conditional upon the prisoner undergoing the lighter sentence. Apart from such a peculiar case, however, the confirming authority may commute, mitigate, or altogether remit the punishment.

The power of remission, mitigation, or commutation may be exercised at any time after confirmation by the authorities empowered in that behalf in subsection 2. In effect the Commanding Officer who confirms a Regimental Court Martial cannot exercise this power after promulgation, as he is not one of the authorities specified. The proceedings of a Court Martial are not out of the hands of the confirming officer until they are duly promulgated. Up to that time he may vary or amend in any way his minute of confirmation so long as in its final shape it is not inconsistent with law.

When a Court finds a prisoner guilty of a charge with the exception of certain words, and the words thus omitted constitute the essence of the charge, the finding should be regarded by the confirming officer as an acquittal, and he should withhold confirmation. Thus, where upon a charge for receiving certain articles "knowing them to be stolen" the Court through misapprehension of the law instead of acquitting found the prisoner "guilty of the charge with the exception of the words knowing them to be stolen" it was in law an acquittal. Not unfrequently a recommendation to mercy expresses an opinion which if legally acted upon would have



caused an acquittal. The confirming officer should so regard it.

Where a person not duly authorized confirms in error, his act as well as the promulgation thereof, is a nullity and it is still open to the proper authority to confirm.

Without due confirmation there is no trial and consequently no conviction, Section 55 (6), and of course no record against the prisoner.

No alteration can be made in the recorded proceedings of a Court Martial after promulgation, and the Court must be deemed to have been held in all respects as the proceedings when promulgated disclose. This has been held by successive authorities, even to the extent of saying that an omission, though accidental, which affected the validity of a conviction, could not be supplied after promulgation so as to give it validity. Where, for instance, the name of one of the members of the Court was accidentally omitted and the Court was thus apparently reduced below the legal number, the Court was held to have been constituted of those only whose names were recorded on the face of the proceedings, and the conviction was therefore illegal.

But where some sheets of the proceedings were lost, and the matter therein recorded was fresh in the mind of the President, a declaration from him (before confirmation) as to the substantial contents was permitted to be substituted for the lost portion.

A confirming officer is prevented reassembling a Court to reverse an acquittal or to increase a legal punishment. How far it rests with him to give or withhold confirmation is a somewhat delicate question. Where he differs in opinion from the Court regarding the value of certain evidence affecting the issue it is of course open to him to reassemble the Court and put forward his views with a view to a revision of a finding of guilty. But I venture to think that such an exercise of authority is to be justified only by circumstances leading to the inference that the Court have misapprehended the legal effect of the evidence or some other matter. It is to be borne in mind that the Court have had personal knowledge, not only of the substance of the evidence but of the demeanour (often a material point) of the witnesses, and they are probably better able to discriminate between a conflict of testimony than any person not having the same advantage.

There are similar and even stronger reasons why a confirming officer should not comment upon a punishment as inadequate. The law has advisedly taken away from him the power of increasing it on the principle that the Court are likely to be the best judges in the matter, and it is hardly consistent with that principle that a body of men sworn to do justice should be rebuked. My own observation, and the statistical returns of the army, do not lead me to think that severe punishments are the most efficacious deterrents from crime, and Courts Martial would do well to be guided in this respect by the temperate injunctions contained in the Queen's Regulations (Section VI. 99).

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## PREVIOUS TRIAL.

### SECTION 157.

By this section a person who has been convicted or acquitted of an offence by a Court Martial "shall not be liable to be tried again by Court Martial in respect of that offence."

To bar a second trial under this Section the following conditions are essential. The first Court (1) must have had jurisdiction; (2) it must have come to a finding; (3) if the finding has been one of guilty, that finding must have been legally confirmed, and (4) the offence so dealt with must have arisen from the same set of facts and be in substance the same offence as that charged upon the second trial.

The second trial would not be illegal if the first Court (even though its proceedings were confirmed) was composed of officers not competent to try the offence or the offender; or if

The first Court, although legally constituted, became dissolved, or for any reason failed to come to a finding; or if

The first Court had not jurisdiction over the prisoner or the offence; or if

The finding, when one of guilty, was not legally confirmed; or if

The offence newly charged, although committed at the same time and by the same act, was not in substance and degree the same as that previously adjudicated upon and was not known at all or not known in its effect or degree to the commanding

officer when he caused the prisoner to be tried on the first occasion.

In any other contingency that I can contemplate, I think a second trial, when the subject of the charge had been duly disposed of, would be illegal. The main principle to be borne in mind is that the soldier should not be placed twice in actual peril in respect of the same act.

Where a soldier was convicted and punished for making a false answer on attestation as to his having previously served in the 22nd Regiment, and it was found out (after he had undergone his punishment) that he had also been discharged with ignominy from the 60th and the 8th, the fact of the former conviction was held not to bar his trial (under Section 32) for the concealment of the discharge, although that concealment had taken place upon the same occasion as the false answer previously adjudicated upon.

But if the charge had been for making a false answer as to the fact of his having served in the 60th or the 8th he would not have been liable to be tried a second time; as that offence, although not specified in the charge preferred upon the former trial was yet covered by the substance of that

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charge which was that he had made a false answer to the question "Have you ever served in the Army?"

Hence it would follow that a leading principle to bear in mind is whether any facts discovered subsequently to the first trial constituted either an offence (1) committed on a separate occasion or (2) distinct in its nature or degree from that adjudicated upon by the Court first assembled. It has been laid down that the test question is this. Would the evidence produced on the second trial have sufficed to obtain a conviction upon the first? If so, the second trial is illegal.

THE END.



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